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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 239

ABE FISCHER, PETITIONER,

vs.

PAULINE OIL & GAS COMPANY

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA**

PETITION FOR CERTIORARI FILED JULY 28, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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ABE FISCHER, PETITIONER,

vs.

PAULINE OIL & GAS COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA

INDEX.

	Original	Print
Proceedings in Supreme Court of Oklahoma.....	a	1
Petition in error	a	1
Case made from District Court of Pawnee County.....	1	2
Caption	1	2
Petition	2	2
Exhibit "A"—Sheriff's deed and conveyance on execution	6	4
Answer and cross-petition	12	8
Exhibit "A"—Assignment for the benefit of creditors	19	12
Exhibit "B"—Inventory of Geraldine Oil Co. (omitted in printing)	22	
Exhibit "C"—Bond of assignee for benefit of creditors (omitted in printing)	27	
Exhibit "D"—Assignment of oil and gas lease, January 21, 1935.....	30	14
Exhibit "E"—Order of D. C. U. S., Western Oklahoma, approving assignment, Case No. 6344.....	34	16
Reply to answer, and answer to cross-petition.....	37	17
Exhibit "A"—Judgment and award of Industrial Commission, August 30, 1934, No. A-79041 (omitted in printing)	43	

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Case made from District Court of Pawnee County, Con-
tinued.

	Original	Print
Amendment to answer and answer to cross-petition.....	50	20
Statement of evidence.....	52	21
Caption and appearances.....	52	21
Motion for leave to amend answer.....	53	21
Testimony of Miss Lavara Dobson (omitted in print- ing).....	65	
J. H. Wilkerson (omitted in print- ing).....	82	
J. H. Wilkerson (recalled) (omitted in printing).....	87	
O. T. Lowry.....	88	21
H. E. Beese (deposition) (omitted in printing).....	103	
O. T. Lowry (recalled) (omitted in printing).....	110	
B. Rainbolt... (omitted in printing) ..	175	
Ralph Rainbolt (omitted in printing) ..	179	
Sam Rainbolt (omitted in printing) ..	185	
Dick Sutton.. (omitted in printing) ..	188	
H. H. Justice (omitted in printing) ..	200	
O. T. Lowry (recalled) (omitted in printing).....	215	
R. W. Dick... (omitted in printing) ..	223	
Motions for directed verdict (omitted in printing) ..	230	
Plaintiff's Exhibits:		
1—Judgment of Industrial Commission (omitted in printing).....	234	
2—Order of execution (omitted in printing) ..	238	
3—Execution, Case No. 8066 (omitted in print- ing).....	240	
4—Execution, Case No. 8066.....	242	23
6—Order confirming sale, Case No. 8066 (omitted in printing).....	254	
7—Order confirming sale, Case No. 8066 (omitted in printing).....	257	
8—Sheriff's deed.....	261	25
9—Assignment of lease (omitted in printing) ..	262	
10—Bond to Johnson Oil Refining Company (omitted in printing).....	266	
11—Transfer order..... (omitted in printing) ..	270	
12—Letter, Pauline Co. to Johnson (omitted in printing).....	273	
13—Letter, Pauline Co. to Johnson (omitted in printing).....	274	
14—Check, \$2,500, Pauline Company to Burk- hart.....	275	26
15—Bankruptcy proceedings—Case No. 6344... ..	276	27
16—Cancellation of charter, Geraldine Oil Co. (omitted in printing).....	301	

INDEX

iii

Case made from District Court of Pawnee County—Continued.

Statement of evidence—Continued.

Plaintiff's Exhibits—Continued.

Original Print

17—Proof of debt, Pauline Oil and Gas Co. (omitted in printing).....	304	
18—Trustees' final report—Case No. 6344.....	321	30
19—Execution, Case No. 8606 (omitted in printing)	324	
20—Motion to confirm sale, Case No. 8606 (omitted in printing).....	337	
21—Order confirming sale, Case No. 8606 (omitted in printing).....	339	
22—Motion to vacate sale and order of confirmation (omitted in printing).....	341	
23—Objections to confirmation of sale (omitted in printing)	348	
24—Objections to confirmation of sale (omitted in printing)	350	
25—Copy of check, \$1,500 (omitted in printing)	353	
26—Check, \$500	354	
27—Check, \$2,400	355	
28—Petition, Case No. 8592 (omitted in printing)	356	
29—Summons, Case No. 8592 (omitted in printing)	363	
30—Journal entry of judgment, No. 8592 (omitted in printing).....	366	
31—Praecipe for execution, No. 8592 (omitted in printing)	368	
32—Execution, Case No. 8592 (omitted in printing)	369	
33—Order approving sheriff's sale, No. 8592 (omitted in printing)	381	
34—Sheriff's deed to Kerr and Sutton (omitted in printing)	383	
35—Assignment, April 29, 1930 (omitted in printing)	389	
36—Assignment, July 17, 1934 (omitted in printing)	391	
37—Assignment, December 21, 1935 (omitted in printing)	394	

Defendant's Exhibits

1—Adjudication of bankruptcy, Case No. 6344	397	32
2—Assignment for benefit of creditors.....	400	33
3—Assignment of oil and gas lease.....	401	33
5—Notice of sale..... (omitted in printing) ..	402	
6—Registry return card (omitted in printing) ..	104	

Reporter's certificate

Verdict

Journal entry of judgment.....

406 407 34

Case made from District Court of Pawnee County—Continued.

	Original	Print
Motion for new trial..... (omitted in printing) ..	412	
Order overruling motion for new trial (omitted in printing) ..	414	
Supersedeas bond (omitted in printing) ..	416	
Order extending time (omitted in printing) ..	424	
Order extending time (omitted in printing) ..	426	
Certificates to case made..... (omitted in printing) ..	428	
Mandate of Supreme Court.....	434	37
Opinion, Welch, J..P.....	434	39
Petition for rehearing	439	45
Order denying petition for rehearing.....	452	46
Application for permission to file second petition for rehearing	453	46
Order denying application for leave to file second petition for rehearing	456	46
Orders staying proceedings	457	49
Notice of appeal	459	50
Petition for appeal, assignments of error and prayer for reversal	460	51
Order allowing appeal.....	465	55
Citation and service (omitted in printing) ..	466	
Bond on appeal (omitted in printing) ..	467	
Praecipe for transcript of record.....	469	57
Clerk's certificate (omitted in printing) ..	472	
Statement of points to be relied upon.....	473	59
Designation of record	475	60
Order allowing certiorari	476	61

[fol. a]

[File endorsement omitted]

1

IN SUPREME COURT OF OKLAHOMA

No. 27931

PAULINE OIL & GAS COMPANY, a Corporation, Plaintiff in Error,

vs.

ABE FISCHER, Defendant in Error

PETITION IN ERROR—Filed May 29, 1937

The Pauline Oil & Gas Company, a corporation, plaintiff in error above named, complains of said defendant in error, Abe Fischer, for that the said Abe Fischer, at the July term of the District Court of Pawnee County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Pauline Oil & Gas Company, in a certain action then pending in said court, wherein the said Abe Fischer was plaintiff and the said Pauline Oil & Gas Company was defendant. The original case made, duly certified and attested, is hereto attached, marked Exhibit A, and made a part of this petition in error.

And the said Pauline Oil & Gas Company avers that there is error in the said record and proceedings in this, to wit:

1. Said court erred in overruling motion of plaintiff in error for a new trial.
2. Said court erred in overruling the demurrer of plaintiff in error to the evidence of the defendant in error.
3. Said court erred in overruling motion of said plaintiff in error for a directed verdict.
4. Said court erred in sustaining the motion of defendant in error for a directed verdict.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside, and held for naught, and that a judgment may be rendered in favor of the plaintiff in error and against the defendant in error, upon the undisputed facts, and that the plaintiff in error be restored to all rights that it has lost by the rendition of said judgment.

ment, and for such other relief as to the court may seem just.

**Pauline Oil & Gas Company, a Corporation, Plaintiff
in Error, By T. G. Chambers, James R. Eagleton,
Its Attorneys.**

[fol. b]

[File endorsements omitted]

[fol. 1] **IN DISTRICT COURT WITHIN AND FOR THE COUNTY OF
PAWNEE, STATE OF OKLAHOMA**

No. 8989

ABE FISCHER, Plaintiff,

vs.

PAULINE OIL & GAS COMPANY, a Corporation, Defendant

**Case Made—Filed May 20, 1937; Filed in Supreme Court
May 29, 1937**

Be it Remembered, That heretofore, to wit, on the 4th day of August, 1936, the plaintiff herein, Abe Fischer, commenced his action against the defendant above named, Pauline Oil & Gas Company, a Corporation, by filing in the District Court within and for the County of Tulsa, State of Oklahoma, his Petition.

Which said Petition, together with all endorsements thereon, is in the words and figures following, to wit:

[fol. 2] **IN DISTRICT COURT OF PAWNEE COUNTY**

[Title omitted]

PETITION—Filed Aug. 4, 1936

First Cause of Action

Comes now the plaintiff and for cause of action against the defendant alleges and states:

That the Pauline Oil & Gas Company is a corporation duly organized under and by virtue of the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, Oklahoma.

That the plaintiff has the legal estate and equitable estate in and to the producing oil and gas lease in, on and under the following real estate, to-wit:

All that portion of Lot Nine (9) in Section Thirty (30), Township twenty-one (21) North, Range Nine (9) East of I. M., lying west of a line parallel to the west line of said section and 1980 feet east thereof in Pawnee County, State of Oklahoma,

as well as all material, casing, tanks, buildings, towers, [fol. 3] engines, machinery, pumps, pipe, lines, rods, and all other property, fixtures and equipment on or in said real property and/or used in connection with the production of the oil and gas and the operation of said property; and said plaintiff is entitled to the immediate possession of the said property; a copy of the deed evidencing such title is hereto attached, marked Exhibit "A" and made a part hereof and referred to the same as if set out in full.

Plaintiff further states that he has been damaged in the sum of \$500.00 by said defendant unlawfully withholding said possession.

Plaintiff further states that the said defendant has so unlawfully kept plaintiff out of possession since the 10th day of June, 1936, and collected and used for its own use and benefit during said time, the proceeds from the production therefrom and profits arising from said property in the sum of \$500.00.

Second Cause of Action

For his Second Cause of Action plaintiff re-alleges and re-avers all of the facts of his First Cause of Action contained; and

That the said defendant claims some right, title, or interest in and to said real property adverse to this plaintiff, the exact nature of which is to this plaintiff unknown, which constitutes a cloud on the title of the plaintiff.

[fol. 4] Third Cause of Action

For his Third Cause of Action plaintiff re-alleges and re-states all of the facts and things stated in his First and Second causes of action; and,

That the defendant is damaging and destroying and disposing of the property of this plaintiff in that it is taking,

4
selling and disposing of the minerals, oils and gases taken and abstracted therefrom, is taking, removing and disposing of the fixtures and appurtenances thereunto belonging and unless restrained and enjoined will continue so to do, and that unless the defendant is restrained and enjoined from so disposing, removing, taking and destroying the property of the plaintiff, the plaintiff will suffer irreparable damage.

Wherefore, Plaintiff prays for judgment for the possession of said premises and for \$500.00 damages for withholding possession, and for \$500.00 for rents and profits and that he have judgment against the said defendant adjudging said plaintiff is the owner of the legal title in and to said property and premises free and clear of all liens, claims and incumbrances, and that the defendant has no right, title, or interest therein and that it be barred and enjoined from asserting any right, title, claim or interest therein and that the title of the plaintiff be quieted and confirmed; and that pending the final hearing of this case, the defendant be restrained and enjoined from damaging, removing, taking, selling or disposing of said premises and property and/or any portion thereof and from selling and disposing of any of the oil, gas or other minerals in, on or under said premises.

Horace Ballaine, Hunt & Eagleton, Attorneys for Plaintiff.

Duly sworn to by Abe Fischer. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO PETITION

Sheriff's Deed and Conveyance on Execution

This indenture, made this 10th day of June, 1936, between C. M. Burkdoll, Sheriff of Pawnee County, State of Oklahoma, party of the first part and Abe Fischer of the County of Tulsa, State of Oklahoma, party of the second part:

Witnesseth, That whereas, by virtue of a writ of execution issued out of and under the seal of the District Court of Pawnee County, State of Oklahoma, attested the 13th day of September, 1935, upon a judgment for the sum of \$389.87 with \$75.00 and costs accruing, with interest thereon from December 6, 1934, recovered in the Industrial Commission

of the State of Oklahoma, and filed in said court on the 8 day of December, 1924, in case No. 8666, and duly adopted in said court, said judgment being in favor of Sam Rainbolt and against Geraldine Oil Company, a corporation, said writ being to the Sheriff of said County directed and delivered, commanding him that of the personal property of said judgment debtor, he should cause to be made certain moneys in said writ specified, and if sufficient personal property of the said judgment debtor, Geraldine Oil Company, could not be found, that he should cause the amount of said judgment, with costs, to be made of the real property in said County, belonging to said judgment debtor, not exempt from execution; and,

Whereas, Sufficient personal property of said judgment debtor could not be found, whereof, he, the said sheriff, [fol. 7] could cause to be made the money specified in the writ; therefore, he, the said sheriff, did in obedience to said command, levy on, take and seize all the right, title and interest which the said judgment debtor so had in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, said levy being made on the 17th day of September, 1935; and said sheriff thereupon on the said date, did call an inquest of three disinterested householders resident within the said County of Pawnee, State of Oklahoma, and administered to them an oath impartially to appraise the property so levied, upon actual view thereof, and the said householders having duly and as directed, appraised the said property, to wit:

An oil and gas mining lease belonging to said defendant, covering all that portion of Lot Nine (9) in Section Thirty (30), Township Twenty-one (21) North, Range Nine (9) East, I. M. lying West of a line parallel to the West line of said Section, and 1980 feet East thereof, in Pawnee County, State of Oklahoma, and all material, casing, tanks, buildings, powers, engines, machinery, pumps, pipe, lines, rods, and all other property, fixtures and equipment on or in said leasehold or used in connection with the production or operation thereof;

forthwith made and returned to said sheriff under their hands, an estimate and appraisement of the real value of said property, which said appraisers fixed at \$600.00; and

on receipt of said appraisement, the sheriff deposited a copy [fol. 8] thereof with the Clerk of said Court; and,

Whereas, Said Sheriff thereupon advertised said property for sale by giving due and legal notice of the time and place of sale and the property to be sold, by advertising the same in Cleveland American, a weekly newspaper of general circulation printed and published in said County of Pawnee, once a week for at least thirty days prior to the date of sale, which was on the 12th day of November, 1935; and

Whereas, on the 12th day of November, 1935, pursuant to said notice of sale, the sheriff did offer the said property for sale at public auction at the south front door of the court house in the City of Pawnee in said County and State, at the hour of eleven o'clock A. M., at which sale the said property was sold and struck off to the said Abe Fischer, the party of the second part, for \$750.00, the said Abe Fischer being the highest bidder, and that being the highest sum bid, and the whole price paid for same, and being more than two-thirds of the appraised value thereof; and

Whereas, the said sheriff having made return of said execution into said court, on the 12 day of Nov., 1935, with his proceedings thereunder duly certified, and endorsed thereon, and the said court having carefully examined said proceedings, and being satisfied that the said sale had in all respects been made in conformity with the provisions of law, did on the 28th day of March, 1935, direct that the sheriff make and execute to said purchaser, Abe Fischer, party of the second part, a good and sufficient deed to said premises so sold;

[fol. 9] Now; Therefore, the sheriff of Pawnee County, aforesaid, party of the first part, by virtue of said writ and order, and in pursuance of the statutes in such case made and provided, for and in consideration of the said sum above mentioned, to him in hand paid by Abe Fischer, party of the second part, the receipt of which is hereby acknowledged, hath granted, bargained and sold, conveyed and confirmed, and by these presents, doth grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns, all the estate, right, title and interest which the said judgment debtor, the said Geraldine Oil Company, had on the 13 day of September, 1935, or at any time thereafter, or now has, of, in and to the following described premises, situated in the said County of Pawnee, State of Oklahoma, to wit:

An oil and gas mining lease belonging to said defendant covering all that portion of Lot Nine (9) in Section Thirty (30), Township Twenty-one (21) North, Range Nine (9) East, I. M. lying west of a line parallel to the west line of said Section, and 1980 feet East thereof, in Pawnee County, State of Oklahoma, and all material, casing, tanks, buildings, powers, engines, machinery, pumps, pipe, lines, rods, and all other property, fixtures and equipment on or in said leasehold or used in connection with the production or operation thereof,

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To Have and to Hold, the said premises, with the ap-[fol. 10] purtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as he, the sheriff aforesaid, can, may or ought to by virtue of the said writ, and of the statutes in such case made and provided, grant, bargain, sell, release, convey and confirm the same.

In Witness Whereof, the said party of the first part, sheriff as aforesaid, hath hereunto set his hand and seal the day and year first above written.

C. M. Burkdoll, Sheriff of Pawnee County, State of Oklahoma.

STATE OF OKLAHOMA,
Pawnee County, ss:

Be it remembered, that on this 10 day of June, 1936, before me, the undersigned, a Notary Public, personally appeared C. M. Burkdoll, Sheriff of Pawnee County, Oklahoma, well known to me to be the same person who is described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same as sheriff, and as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal, at said county, the day and year last above written.

Alta Zoldaske, Notary Public. (Seal)

My commission expires March 3, 1938.

Recorded in the office of County Clerk of Pawnee County,
June 17, 1936, Book 55, Page 377.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN DISTRICT COURT OF PAWNEE COUNTY

[Title omitted]

ANSWER AND CROSS PETITION OF DEFENDANT, PAULINE OIL
AND GAS COMPANY, A CORPORATION—Filed Sept. 25, 1936

Answer to Plaintiff's First and Third Causes of Action

Comes now the defendant, Pauline Oil and Gas Company, a corporation, and for its answer to plaintiff's first and third causes of action, denies generally and specifically each and every allegation therein contained.

Answer to Plaintiff's Second Cause of Action

Comes now the defendant, and for its answer to plaintiff's second cause of action, denies generally and specifically each and every material allegation therein contained, except as hereinafter specifically admitted.

For further answer, plaintiff alleges that prior to the times hereinafter mentioned, and on the 30th day of January, 1917, a certain oil and gas mining lease was made and entered into by and between W. H. Edmisten and S. C. Edmisten, husband and wife, and F. B. Owen, lessee, covering, together with other property, particularly the following described real estate, situated in Pawnee County, State of Oklahoma, to wit:

All that portion of Lot Nine (9) in Section Thirty (30) Township Twenty-one (21) North of Range Nine (9) E. I. M. lying west of the line parallel to the west line of said section and 1980 feet East thereof; which said lease was recorded in the office of the County Clerk in and for said county, in Book 3 of Oil Leases, page 306, and which is hereby referred to and made a part hereof, as if herein fully set up; and at the time of the execution of said lease, as aforesaid, the said W. H. Edmisten and S. C. Edmisten, husband and wife, were the owners in fee simple of said above described property.

That thereafter by various conveyances the Geraldine Oil Company, a corporation, through various assignments, became the owner of said oil and gas lease insofar as it covers said above described property; and on the 11th day of October, 1934, the said Geraldine Oil Company was owner of said lease, as aforesaid, and on said date that the Geraldine Oil Company was insolvent, having insufficient assets with which to pay its creditors, and that in accordance with resolutions of stockholders and directors of said corporation duly, regularly, and lawfully made, it did by its good and valid assignment assign and convey to Louis R. Burkhart, in trust for the benefit of creditors, all its property, both real and personal not exempt from execution, and all its rights, whether legal or equitable, and in particular the following described real estate situated in Pawnee County, State of Oklahoma, to-wit:

All that portion of Lot Nine (9) in Section Thirty (30) Township Twenty-one (21) North of Range Nine (9) E. I. M. lying west of the line parallel to the west line of said Section and 1980 feet East thereof, together with all improvements thereon and the appurtenances thereunto belonging, which said assignment was duly and regularly filed for record with the County Clerk in and for Pawnee County, Oklahoma, on the 12th day of October, 1934, and recorded in Book 49 of Miscellaneous, Page 637, of the records of the County Clerk in and for said County, and which said assignment was duly filed for record with the County Clerk in and for Oklahoma County, State of Oklahoma, and recorded in Book 276, page 155, of the records of the County Clerk in and for said county and state, on the 31st day of October, 1934, a copy of said assignment being hereto attached, marked Exhibit "A", and made a part hereof.

That the Geraldine Oil Company's residence and principal place of business was at said time and is now in Oklahoma County, State of Oklahoma, and that on the 31st day of October, 1934, the Geraldine Oil Company filed with the County Clerk in and for Oklahoma County its inventory showing all its creditors, residence, amounts owing, character and security of indebtedness, judgment, and all property of the Geraldine Oil Company which is exempt by law from execution and property not so exempt, in accordance with the provisions of the statutes in such case made and provided, a copy of said inventory being hereto attached, marked Exhibit "B", and made a part hereof.

That thereafter Louis R. Burkhart, said assignee for the benefit of creditors, did execute and file with the County Clerk in and for Oklahoma County his bond duly executed and approved by the judge of the District Court in and for Oklahoma County, as provided by law, a copy of said bond being hereto attached, marked Exhibit "C", and made a part hereof.

○ That on the 21st day of January, 1935, the said Louis R. Burkhart, assignee and trustee for the benefit of creditors, as aforesaid, did, after advertising, sell at public auction to this petitioner, the Pauline Oil and Gas Company, a corporation of Oklahoma, said above described oil and gas lease for the price of \$2500.00, said price and sum being the highest and best bid obtainable and said sum not being disproportionate with the actual value of said oil and gas lease, a copy of said assignment, made and executed in accordance with said sale, being hereto attached, marked Exhibit "D", and made a part hereof. That the said price [fol. 16] of \$2500.00 was held by the said Louis R. Burkhart, assignee and trustee for the benefit of creditors, to be apportioned and divided among the creditors of the said Geraldine Oil Company, a corporation, in accordance with the assignment and trust conveyance of the 11th day of October, 1934, as aforesaid.

That thereafter and on the 24th day of October, 1935, the Geraldine Oil Company was adjudged a bankrupt in the District Court of the United States in and for the Western District of Oklahoma, in cause in bankruptcy No. 6344.

That thereafter and on the 4th day of June, 1936, the Referee in said bankruptcy matter entered an order approving and holding valid the said sale of said oil and gas lease to the defendant, the Pauline Oil and Gas Company, so as aforesaid, a copy of said order being hereto attached, marked Exhibit "E", and made a part hereof; and by reason of the foregoing, the defendant, the Pauline Oil and Gas Company, is the owner of said lease on said property, as aforesaid, superior to any claim, right, title, or interest of the plaintiff herein.

Defendant's Cross Petition

Comes now the defendant, Pauline Oil and Gas Company, a corporation, and by way of cross-petition against the said

plaintiff, Abe Fischer, and for its cause of action against the said Abe Fischer, alleges and says:

Defendant refers to the allegations of new matter con-[fol. 17] tained in its answer to plaintiff's second cause of action, and in this its cross petition alleges said facts and circumstances, so alleged in said answer, the same as if said allegations of fact and matters were herein set out in full, and makes said allegations of new matter in said answer to plaintiff's second cause of action a part of this, its cross-petition.

Defendant further alleges that by reason of said matters so alleged, this defendant is the owner of the oil and gas lease, so aforesaid described, and is in peaceable possession, under said oil and gas lease, of the property therein described, situated in Pawnee County, State of Oklahoma, to-wit:

All that portion of Lot Nine (9) in Section Thirty (30) Township Twenty-one (21) North of Range Nine (9) E. I. M. lying west of the line parallel to the west line of said Section and 1980 feet East thereof.

That the plaintiff herein has recorded a deed, referred to in plaintiff's petition as Exhibit "A". That said deed is void and of no effect as against the title of the defendant, as aforesaid, and constitutes a cloud upon the title of the defendant, as aforesaid, and constitutes a cloud upon the title of this defendant in and to said property. That said plaintiff claims some right, title, or interest in said property adverse to this defendant, the exact nature of which is to this defendant unknown. That said title so claimed by [fol. 18] said plaintiff under said deed, and further claimed by said plaintiff, as aforesaid, is inferior to the title of this defendant.

Wherefore, Defendant prays that it be adjudged to be the owner of said oil and gas lease covering said property, as aforesaid, free and clear of any lien or claim, whether at law or equity, on the part of said plaintiff. That said purported deed set out in plaintiff's petition be declared null and void and of no effect, and that the court adjudge the plaintiff to have no right, title, or interest in or to said oil and gas lease, as aforesaid, and that the said plaintiff and his assigns be forever barred and enjoined from asserting

any right, claim, or interest in and to said property, and that the title of the defendant be quieted therein.

T. G. Chambers, Attorney for Defendant, Pauline Oil and Gas Company.

[fol. 19]

EXHIBIT "A"—To ANSWER

Assignment for the Benefit of Creditors

This indenture made this 11th day of October, 1934, between Geraldine Oil Company, a Corporation, of Oklahoma City, Oklahoma, party of the first part and Louis R. Burkhart, of Oklahoma City, Oklahoma County, Oklahoma, party of the second part, witnesseth:

That said party of the first part being indebted to divers persons and unable to pay its debts in full, but desiring to make an equal and fair distribution of its property among its creditors, for and in consideration of the sum of One (\$1.00) Dollar to it in hand paid, and the trusts herein reposed, has granted, bargained, sold, assigned and conveyed and by these presents does grant, bargain, sell, assign and convey, all its property both real and personal not exempt from execution, and all its rights, whether legal or equitable, and in particular the following described real estate situated in Pawnee County, State of Oklahoma, to wit:

All that portion of Lot Nine (9) in Section Thirty (30) Township Twenty-one (21) North of Range Nine (9) E. I. M. lying west of the line parallel to the west line of said Section and 1980 feet East thereof, together with all improvements thereon and the appurtenances thereunto belonging, to the said party of the second part.

In trust, however, as assignee for the benefit of the [fol. 20] creditors of the said party of the first part, to the end that said Louis R. Burkhart, assignee, shall take immediate possession of said property, and especially take charge of the business heretofore carried on by the said party of the first part, and convert the property, and assets both real and personal thereof, and the debts and accounts due and owing to the said party of the first part on account of said business, into money, by public or private sale, with reasonable diligence and dispatch, using due business cau-

tion in the premises; and shall distribute the same when so converted into money, after paying the costs, charges, disbursements and expenses incident to this assignment, among the several creditors in the due pro rata proportion, without preference; said assignee to be governed in all respects by the statutes in force in said state of Oklahoma for a regulation and enforcement of assignment for the benefit of creditors.

And the said party of the first part does hereby make, constitute and appoint the said Louis R. Burkhart, assignee, to be its true and lawful attorney, with full power of substitution, to do and perform all acts for the said party of the first part, pertaining to the sale and transfer of property, giving deeds and acquittances therefor, and does hereby empower said assignee to recover all property, or rights or equities in property, which might be reached or recovered by any of the creditors of the said party of the first part.

Signed, sealed and delivered the day and year above [fols. 21-29] written.

Geraldine Oil Company, a Corporation. (Signed)
by R. W. Dick.

Attest: (Signed) O. T. Lowry, Secretary.

CORPORATION ACKNOWLEDGMENT

STATE OF OKLAHOMA,
Oklahoma County, ss:

On this 11th day of October, 1934, before me, the undersigned, a Notary Public in and for the county and state aforesaid, personally appeared R. W. Dick, to me known to be the identical person who signed the name of the maker thereof to the within and foregoing instrument as its President and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

(Signed) Lela Butterfield, Notary Public. (Seal.)

My commission expires Sept. 18, 1938.

No. 67626

Recorded

STATE OF OKLAHOMA,
Oklahoma County, ss:

Recorded or Filed

Book 276, Page 155.

1934 Oct. 31—P. M. 4:11.

Helen Nix, County Clerk, by McKinnon, Deputy.

[fol. 30]

EXHIBIT "D" TO ANSWER

Assignment of Oil and Gas Lease

Whereas, On the 30th day of January, A. D. 1917, a certain oil and gas mining lease was made and entered into by and between W. H. Edmisten and S. C. Edmisten, husband and wife, Lessors, and F. B. Owen, Lessee, covering the following described land in the County of Pawnee and State of Okla. to wit:

All of Lot 10 (except the east 20 acres thereof described as follows: Beginning at the southeast corner of lot 10, thence north along the east line thereof 1320 feet; thence West parallel with the south line thereof 660 feet; thence south on a line parallel with the east line thereof, 1320 feet to the south line of said lot; thence East to place of beginning), in Section 30, township 21 north, range 9 east of the Indian Meridian, referred to herein as tract 1; also Lot 9 and all of Lot 8; (except that portion of Lot 8 described as follows: Beginning at the southwest corner of Lot 8, thence north along the west line thereof 1320 feet; thence east 660 feet on a line parallel with the south line thereof; thence south on a line parallel with the west line thereof to the south line of said Lot 8; thence west along the south line of Lot 8 to point of beginning), all in Section 30, township 21 North, range 9 east of the Indian Meridian, referred to herein as tract 2, together with all accretions to said lands, which oil and gas lease also covers other lands not affected hereby.

[fol. 31] Said lease being recorded in the office of the County Clerk in and for said County in Book 3 O&GL page 306, and

Whereas, The said lease and all rights thereunder or incident thereto are now owned by The Geraldine Oil Company, a Corporation, in so far as said lease covers the following described property:

All that portion of Lot Nine (9) in Section Thirty township twenty-one (21) north range nine (9) east, lying west of a line parallel to the west line of said section and 1980 feet east thereof.

Now, Therefore, For and in consideration of One Dollar, (and other good and valuable considerations), the receipt of which is hereby acknowledged, the undersigned, the present owner of the said lease and all rights thereunder or incident thereto, does hereby bargain, sell, transfer, assign and convey unto Pauline Oil and Gas Company, a Corporation, of Oklahoma, all its right, title and interest of the original lessee and present owner in and to the said lease and rights thereunder in so far as it covers the

All that portion of Lot nine (9) in Section Thirty (30), township twenty-one (21) north range nine (9) east, lying west of a line parallel to the west line of said section and 1980 feet east thereof

together with all personal property used or obtained in connection therewith to Pauline Oil and Gas Company, a Corporation, and its heirs, successors and assigns.

[fols. 32-33] And for the same consideration, the undersigned for himself and his heirs, successors and representatives, does covenant with the said assignee, its heirs, successors or assigns that he is the lawful owner of the said lease and rights and interests thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and incumbrances, and that all rentals and royalties due and payable thereunder have been duly paid.

In Witness Whereof, The undersigned owner and assignor has signed and sealed this instrument this 21st day of January, 1935.

Louis R. Burkhart, Assignee of the Geraldine Oil Company, a Corporation, and Trustee for the Benefit of Creditors. (Seal.)

[fol. 34]

EXHIBIT "E" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF OKLAHOMA

In Bankruptcy. No. 6344

In the Matter of the GERALDINE OIL COMPANY, a Corpora-
tion, Bankrupt

ORDER APPROVING ASSIGNMENT TO THE PAULINE OIL AND GAS
COMPANY

This matter coming on for hearing this 4th day of June, 1936, before the Referee, pursuant to notice, upon the petition of the Pauline Oil and Gas Company, a corporation, for approval of assignment to it by Trustee and Assignee for the Benefit of Creditors, and the objections of the Trustee in Bankruptcy to said petition.

The Pauline Oil and Gas Company appeared by its attorney, T. G. Chambers, and the Trustee in Bankruptcy appeared by his attorneys, Priest and Belisle. Thereupon the Trustee in Bankruptcy withdrew his objections to said petition, and the court having heard the evidence in support of said petition, and upon due consideration and being fully advised in the premises, finds that said petition should be allowed and that the assignment by the Trustee and Assignee for the Benefit of Creditors to the Pauline Oil and Gas Company should be approved.

It Is Therefore Ordered, Adjudged and Decreed that the said assignment of January 21, 1935, by Louis R. Burkhardt, Assignee and Trustee for the Benefit of Creditors, to the [fols. 35-36] Pauline Oil and Gas Company, be and the same is hereby approved and held valid, and the Pauline Oil and Gas Company, a corporation, is hereby decreed to be the sole owner of the oil and gas lease covering the following described real estate situated in Pawnee County, State of Oklahoma, to-wit:

All that portion of Lot Nine (9) in Section Thirty (30) Township Twenty-one (21) North of Range Nine (9) E. I. M. lying west of the line parallel to the west line of said Section and 1980 feet East thereof,

together with all improvements thereon and the appurtenances thereunto belonging, free and clear of any claims of

the Trustee in Bankruptcy in this proceedings, and free and clear of any claim of the creditors of the Geraldine Oil Company, bankrupt; and

It Is Further Ordered, Adjudged and Decreed that the Pauline Oil and Gas Company be and it is hereby decreed to be the owner of all oil and gas and the proceeds therefrom produced from said property either in the name of the Geraldine Oil Company, the Pauline Oil and Gas Company, or the Trustee in Bankruptcy, and said oil and gas and the proceeds therefrom which may be impounded or held by the pipeline company receiving same, are hereby ordered released to the said Pauline Oil and Gas Company, a Corporation.

Paul G. Darrough, Referee in Bankruptcy.

[fol. 37] IN DISTRICT COURT OF PAWNEE COUNTY

[Title omitted]

REPLY TO ANSWER, AND ANSWER TO CROSS PETITION—Filed
Oct. 10, 1936

Comes now Abe Fischer, the plaintiff, and for reply to the answer, and answer to the cross-petition filed by the Pauline Oil and Gas Company, denies each and every, all and singular the material allegations therein contained, except in so far as same have been and are herewith otherwise pleaded by the plaintiff herein.

Plaintiff denies, generally and specifically, the allegations with reference to the assignment for the benefit of creditors, except that plaintiff does not deny that the purported [fol. 38] instrument attached to defendant's pleading as "Exhibit A" was signed and filed. Plaintiff does deny, however, that the same was authorized or approved by either the stockholders or directors of said corporation.

Plaintiff admits the execution of defendant's Exhibits "B", "C" and "E".

Plaintiff denies that the purported assignment was made in good faith or in compliance with the Statutes of the State of Oklahoma as made and provided for said purpose, denies the accuracy of the inventory of creditors and assets filed by the Geraldine Oil Company, and denies that the purported order entered in the bankruptcy proceedings on

the confession of the said Trustee is binding or has any effect on said proceedings whatsoever, and in connection therewith, states that no confession made by the said Trustee in Bankruptcy, which would relieve him of personal liability as signer on the bond of the assignee for benefit of creditors, would have any effect whatsoever on the rights of the parties hereto.

Plaintiff further states that on August 30, 1934, Sam Rainbolt obtained an award in the Industrial Commission against Geraldine Oil Company, which said judgment and award was certified to the Court Clerk of Pawnee County and recorded, all as more fully shown by copy thereof, hereto attached and marked "Exhibit A". Plaintiff admits that on August 30, 1934, the Geraldine Oil Company, a corporation, was the owner and in possession of the producing oil and gas lease herein involved.

[fol. 39] Plaintiff states that the right, title and interest of the Pauline Oil and Gas Company, if any there be, which this plaintiff specifically denies, is subject and inferior to the right, title and interest of this plaintiff; that the defendant has no right, title or interest in and to the property, either superior or inferior, to the right, title and interest of the plaintiff; that the purported assignment for benefit of creditors is void and was void and no rights thereunder were obtained by the said defendant.

The said purported assignment was not made in good faith, was not authorized by the corporation, was not authorized by the directors or the stockholders of the corporation, and has not been approved by the said corporation, but same was made by the dominating person or persons of the Geraldine Oil Company without authorization who were likewise the dominating person or persons of the Pauline Oil and Gas Company. The designated assignee, Mr. Burkhardt, is the husband of Mrs. Burkhardt, formerly Green, who is the dominating stockholder, officer and manager of both the Geraldine Oil Company and the Pauline Oil and Gas Company. That said purported assignment was made for the purpose of delaying, impeding and defrauding the creditors of the Geraldine Oil Company, and for the purpose of coercing the bona fide creditors of that company, was made for the purpose of preferring its sister corporation, the Pauline Oil and Gas Company, in its so-called obliga-

tions; that there was no delivery of possession of the said [fol. 40] oil property to the purported assignee for the benefit of creditors at the time of the execution and delivery of the purported assignment. The list of creditors and the list of assets as inventoried and filed are incomplete, inaccurate and wholly insufficient to make a good faith compliance with the Statutes of the State of Oklahoma made and provided for that purpose. That the debts therein listed are inaccurately stated. Liabilities are there listed which it did not have. Assets which the Geraldine Oil Company had are not listed in the purported inventory.

The designated assignee for the benefit of creditors did not make a good faith sale of this property to the Pauline Oil and Gas Company. He made, executed and delivered and filed for record a purported assignment prior to and before he received any payment therefor, and said sale was not a good faith sale and transaction. That the purported conveyance to the Pauline Oil and Gas Company was without force and effect, but was issued for the purpose of delaying the creditors of the Geraldine Oil Company in preferring the Pauline Oil and Gas Company as a claimed creditor thereof.

That pursuant to the scheme to so prefer the Pauline Oil and Gas Company and delay the creditors of the Geraldine Oil Company, a defunct corporation, a corporation claiming to be without assets other than the property involved in this suit, or the proceeds therefrom, purported to file a bankruptcy proceedings and purported to obtain [fols. 41-49] in that bankruptcy proceedings by an agreement between H. E. Beese, surety on the bond of the assignee for benefit of creditors, acting as Trustee in Bankruptcy, to confirm the acts and doings of the said designated assignee for the benefit of creditors and thus relieve the bondsmen of said assignee from liability for the acts and doings of said designated assignee for benefit of creditors.

That at the time the designated assignee purported to convey this property to the Pauline Oil and Gas Company, he did not make delivery of possession thereof to the designated grantee.

That at the time the purported voluntary bankruptcy proceedings were instituted by the Geraldine Oil Company, the Geraldine Oil Company was not in existence as a corporation in that the license of said corporation had thereto-

fore been cancelled by the State of Oklahoma, which cancellation was as of March 5, 1935.

Wherefore, Plaintiff prays as in his original petition.
 -Hunt and Eagleton, Horace Ballaine, Attorneys for
 Plaintiff.

[fol. 50] IN DISTRICT COURT OF PAWNEE COUNTY

[Title omitted]

AMENDMENT TO ANSWER AND ANSWER TO CROSS PETITION—
 Filed Nov. 23, 1936

Comes now the plaintiff, and permission of court having been first obtained, files its amendment to-wit:

That the bankruptcy court in the matter of Geraldine Oil Company, a bankrupt, had no authority or jurisdiction to make any order whatsoever with reference to the property involved in this suit, as the right, title and interest, if any it had, and the plaintiff denies that it had any right, title, interest or jurisdiction whatsoever, was determined adversely to the Trustee in Bankruptcy in the District Court of Pawnee County, Oklahoma, in the cause wherein [fol. 51] Sam Rainbolt was plaintiff, and Geraldine Oil Company was defendant, District Court cause No. 8666. H. E. Beese, Trustee of Geraldine Oil Company, Bankrupt, appeared in the Pawnee County District court cause and objected to the jurisdiction of that court over the property involved in this suit, and the said cause was determined adversely to the said H. E. Beese, Trustee, and said order of the District Court of Pawnee County, Oklahoma, became a final order.

Horace Ballaine, Hunt and Eagleton, Attorneys for
 Plaintiff.

[File endorsement omitted.]

[fol. 52] IN DISTRICT COURT WITHIN AND FOR THE COUNTY OF
PAWNEE, STATE OF OKLAHOMA

No. 8989

ABE FISCHER, Plaintiff,

vs.

PAULINE OIL AND GAS COMPANY, a Corporation, Defendant

STATEMENT OF THE EVIDENCE

Be it Remembered, That heretofore, to-wit, on the 7th day of December, 1936, same being one of the regular days of the July, 1936 Term of the District Court within and for the County of Pawnee, State of Oklahoma, the above entitled cause came on for hearing before his Honor, Thurman S. Hurst, one of the Judges of said Court, and a jury, both parties being present by counsel and having announced ready for trial.

APPEARANCES

Horace D. Ballaine, Esq., and Hunt & Eagleton, by
W. L. Eagleton, Esq., Appearing for the Plaintiff;
T. G. Chambers, Esq., and James R. Eagleton, Esq.,
Appearing for the Defendant.

[fols. 53-87] MOTION FOR LEAVE TO AMEND ANSWER

Mr. Chambers: Comes now the defendant and asks leave to amend its answer to plaintiff's first cause of action by adding thereto the following words: "And for further answer the defendant incorporates herein the allegations of new matter hereinafter alleged in its answer to plaintiff's second cause of action, and alleges that by reason thereof the deed attached to plaintiff's petition as Exhibit A is void." Any objection to that?

Mr. W. L. Eagleton: I have no objection to his making the amendment.

The Court: All right.

[fol. 88] O. T. LOWRY, called as a witness in behalf of the defendant, having been first duly sworn to testify to the

truth, the whole truth and nothing but the truth, was examined in chief by Mr. Chambers and testified as follows:

Q. State your name to the court and jury.

A. O. T. Lowry.

Q. What position if any as an officer of the Pauline Oil and Gas Company do you hold?

A. Secretary treasurer.

Q. I hand you an instrument attached to defendant's answer and cross petition, marked Exhibit D, and ask you to examine that instrument—just a moment please. I hand you an instrument identified as Defendant's Exhibit 3, and ask you to examine that, and I will ask you whether or not that is the original instrument.

A. Yes, sir.

Q. Do you know, was that executed by Burkhart, whom it is purported to be executed by?

A. Yes, sir.

Q. Was that received by you as an officer of the Pauline Oil and Gas Company?

A. Yes, sir.

[fol. 89] Q. Was there any amount paid to the trustee, Mr. Burkhart there, for the execution of that instrument by him?

A. Yes, sir.

Q. What was the amount?

A. Twenty five hundred dollars.

Q. Was that delivered to him, and if so, by whom?

A. Well, we delivered a check to Mr. Burkhart for that amount.

Q. And it was payable—drawn on what?

A. On the First National Bank.

Q. I mean drawn by—

A. Drawn by the Pauline Oil and Gas Company, on their account.

Q. Was the check cleared?

A. Yes, sir.

[fols. 90-241] Cross-examination.

By Mr. W. L. Eagleton:

Q. Where is that check, Mr. Lowry?

A. I have it in my possession.

Q. May we see it, please sir?

A. (Witness produces check.)

Q. Is this the check which is marked Plaintiff's Exhibit 14?

A. Yes, sir.

Mr. W. L. Eagleton: We wish to offer the check in evidence.

Mr. Chambers: No objection.

[fol. 242] PLAINTIFF'S EXHIBIT 4, CASE NO. 8989, DISTRICT COURT

No. 8666

Execution—General Form

In the District Court of Pawnee County, in the State of Oklahoma

SAM RAINBOLT, Plaintiff,

vs.

J. W. SNYDER and GERALDINE OIL COMPANY, Defendants

The State of Oklahoma To the Sheriff of Pawnee County, in the State of Oklahoma, Greeting:

Whereas, On the 30th day of August, A. D. 1934, the said Sam Rainbolt recovered a judgment in and before the Industrial Commission of the State of Oklahoma, against the above named defendants, J. W. Snyder and Geraldine Oil Company, in the above entitled action for the sum of Three Hundred Eighty-Nine and 87/100 Dollars, (\$389.87) debt and damages, which judgment bears interest at the rate of six per cent per annum from December 6th, 1934, and costs of suit assessed and accruing at \$75.00, as the same now appears of record in the District Court of Pawnee County, Oklahoma,

And, Whereas, There now remains unpaid on said judgment the sum of Three Hundred Eighty-nine and 87/100 Dollars, (\$389.87), together with interest thereon at the rate of six per cent per annum from the 6th day of December, A. D. 1934, and costs accrued and accruing in the sum of \$75.00.

Now, Therefore, You are hereby commanded that of the [fols. 243-251] goods and chattels of said judgment debtor, Geraldine Oil Company, you cause to be made the sum of Three Hundred Eighty-nine and 87/100 Dollars (\$389.87) and interest thereon at the rate of six per cent from the 6th day of December, A. D. 1934, and costs accrued and accruing in the sum of \$75.00, and for want of goods and chattels, you cause the same to be made of the lands and tenements of the said judgment debtor, Geraldine Oil Company.

And you are further commanded to return this writ into this court within sixty days from the date hereof, with your return of service of the same endorsed hereon.

Hereof fail not at your peril.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Pawnee, in said Pawnee County, this 13th day of September, A. D. 1934.

Nora B. Harshbarger, Court Clerk. By Ethel Traver,
Deputy. (Seal.)

[fol. 252] Sheriff's Office, Pawnee County, Oklahoma

Received this writ this 13th day of September, 1935, at 4:00 o'clock P. M. According to the command of the within writ, finding not sufficient goods and chattels belonging to the within named defendant whereon to levy, on the 17th day of September, 1935, I did forthwith levy said writ upon the following described property of said debtor, situated in Pawnee County, State of Oklahoma, to-wit:

An oil and gas mining lease belonging to said defendant covering all of that portion of Lot 9 in Section 30, Township 21 North, Range 9 East 1. M. lying west of a line parallel to the west line of said section and 1980 feet east thereof in Pawnee County, Oklahoma, and all material, casings, tanks, buildings, powers, machinery, engines, pumps, pipe, lines, rods and all other property, fixtures, and equipment on said lease-hold used in connection with the operation or production thereof

which are liable to satisfy said judgment and did cause the same to be appraised by O. E. Fluharty and W. L. Custer, and J. H. Lucas, three disinterested householders residing within the said county wherein said lease is situated, and

administered to them an oath impartially to appraise said properties levied on, on actual view. And said householders did forthwith return to me, under their hands, an estimate of the real value of said property, and upon receiving said return, I did forthwith deposit a copy thereof with the clerk [fols. 253-260] of the said district court, and did cause public notice of the time and place of said sale of said property to be given over thirty days before the sale thereof in The Cleveland American, a newspaper printed in and of general circulation in Pawnee County, Oklahoma, a copy of said notice with the printers affidavit of publication is hereto attached and made a part of this return.

On the 12th day of November, 1935, at 11 o'clock A. M. I offered the said property for sale at the front door of the court house in Pawnee, Oklahoma, at the time and place stated in said notice at public auction to the highest bidder for cash in hand, I sold the above described property to Abe Fischer for the sum of \$750.00, cash in hand, he being the highest and best bidder therefore, and that being the highest and best bid therefor and being for more than $\frac{2}{3}$ of the appraised value, said purchase money being now held subject to order of the court.

I certify the above to be the times and manner of executing the within writ.

Dated and returned to Court this 12 day of November, 1935.

C. M. Burkdoll, Sheriff of Pawnee County, Oklahoma,
by Elmer R. Lynch, Undersheriff.

Endorsements: 8666. Execution. Filed in the District Court, Pawnee County, Oklahoma, Nov. 13, 1935. Nora B. Harshbarger, Court Clerk, by Ethel Traver, Deputy.

[fols. 261-274] PLAINTIFF'S EXHIBIT 8

Plaintiff's Exhibit 8 in said cause was the Sheriff's Deed and Conveyance on Execution; said Sheriff's Deed and Conveyance on Execution was attached as Exhibit A to the Petition of the Plaintiff in this cause, and is hereinbefore set out at page 6 of this case made, and is not recopied at this point.

[fol. 275] PLAINTIFF'S EXHIBIT 14, CASE NO. 8989, DISTRICT COURT

Voucher No. A-6.

Check No. 656

Oklahoma City, Okla.,

Date: January 21st, 1935.

OK. Date

K

Pay to the Order of Louis R. Burkhart, Assignee
Address _____ City _____

The Sum of \$2500 and 00 cts.

Dollars \$2,500.00

In full payment of account as shown above

The Pauline Oil & Gas Company, by O. T. Lowry,
Secretary and Treas.

Countersigned by Myrtle Green, President.

First National Bank & Trust Company,
Oklahoma City, Oklahoma.

39-15

Apr. 7, 1936.

7

39 Paid 1

4-8-35

Endorsements: Pay to the Order of H. E. Beese, Trustee
in Bankruptcy in re Geraldine Oil Company, Bankrupt,
without recourse on me.

Louis R. Burkhart, Assignee of Creditors of Geraldine Oil Company. H. E. Beese, Trustee in Bankruptcy, Geraldine Oil Company.

15 Paid Through Clearing House 15

or

Pay to the Order of Any Bank, Banker or Trust Co.

Prior Endorsements Guaranteed. Apr. 8, '36

39-15

39-15

The Tradesmens National Bank, Oklahoma City, Okla.

[fol. 276-285] **PLAINTIFF'S EXHIBIT 15, CASE No. 8989,**
DISTRICT COURT

[fol. 290] **Schedule B—Statement of All Property of
 Bankrupt**

Schedule B-1

Real Estate

Estimated Value

Oil and Gas Lease, dated January 30, 1917, entered into between W. H. Edmisten and S. C. Edmisten, husband and wife, lessors, and F. B. Owens, lessee, covering the following described property, situated in Pawnee County, State of Oklahoma, to-wit:

All that portion of Lot 9, in Section 30, township 21 North, Range 9 East, lying West of the line parallel to the West line of said Section, and 1980 feet East thereof; Subject to claim of J. W. Snyder for \$475 to be paid out of $\frac{1}{4}$ of $\frac{7}{8}$ of the oil produced from well #9

100.00

Total

\$100.00

Geraldine Oil Company, a Corporation, Petitioner,
 By: R. W. Dick, President; O. T. Lowry, Secretary.
 (Seal.)

This schedule must be executed in triplicate.

Schedule B-2

Personal Property

- | | |
|--|------|
| A. Cash on hand | None |
| B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately) | None |
| C. Stock in trade in — business of [fol. 291] — at —, of the value of — | None |
| D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz: | None |
| E. Books, prints and pictures, viz: | None |

- F. Horses, cows, sheep and other animals, (with number of each) viz: . . . None
 G. Carriages and other vehicles, viz: . . . None
 H. Farming stock and implements of husbandry, viz: . . . None
 I. Shipping and shares in vessels, viz: None
 K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz:

Power House and equipment, situated on said lease premises in Pawnee County, Oklahoma	\$200.00
Two-100 bbl. Storage Tanks, situated on said lease premises	100.00
One Flow Tank, situated on said lease premises	25.00
10,000 ft. 2 in. Line Pipe, situated on said lease premises, at 2¢ per foot	200.00
8,395 ft. Rods, situated in said lease premises, at 1½¢@ per foot	125.92
8,395 ft. 2 in. Tubing, situated on said lease premises, at 3¢ per foot	251.85
320 ft. of ten inch casing in hole, situated on said lease premises, at 12½¢ per foot	40.00
3,775 ft. of eight inch casing in hole, situated on said lease premises, at 12½¢ per foot	371.87½
840 ft. of six inch casing in hole, situated [fol. 292] on said lease premises, at 12½¢ per foot	105.00
7,350 ft. of 5 3/16 inch casing in hole, situated on said lease premises, at 12½¢ per foot	918.75
8 pump jacks	40.00
250-bbl. Wood Water Tank	25.00
One pulling machine	25.00
One Miller Bailer	35.00
5 inch swab	50.00
13 joints 6½ inch casing, at \$5 per joint	65.00
21 joints 8¼ inch casing at \$5 per joint	105.00
9 joints 10 inch casing at \$5 per joint	45.00

Total

\$2,828.39

L. Patents, copyrights, and trade marks, viz:	None	
M. Goods or personal property of any other description, with the place where each is situated, viz:	None	
Total		2,828.39

Geraldine Oil Company, a Corporation, Petitioner,
By: R. W. Dick, President; O. T. Lowry, Secretary.
(Seal.)

Schedule B-3

Choses in Action

A. Debts due petitioner on open account. From Johnson Oil and Refining Company of Cleveland, Oklahoma, for oil runs [fol. 293] from oil and gas lease from March 1, 1935, to June 29, 1935, about	\$225.00
B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds	None
C. Policies of Insurance	None
D. Unliquidated claims of every nature with their estimated value Due from Earle Bailey, receiver in case in the District Court in and for Pawnee County, Docket No. 8736, H. M. Chapman et al. vs. Geraldine Oil Company et al., for tools and equipment taken off lease while in his charge, about	250.00
E. Deposits of money in banking institutions and elsewhere	None
Total	\$475.00

Geraldine Oil Company, a Corporation, Petitioner,
By: R. W. Dick, President; O. T. Lowry, Secretary.
(Seal.)

Schedule B-4

[fol. 294] **Property Heretofore Conveyed for Benefit of Creditors**

All petitioner's property, both real and personal not exempt from execution, and all its rights, whether legal or equitable, and in particular, all its interest in and to the following described real estate situated in Pawnee County, State of Oklahoma:

All that portion of Lot 9, in Sec. 30, Twp. 21 North, Range 9 East, lying West of the line parallel to the West line of said Section, and 1980 ft. East thereof,

together with all improvements thereon and appurtenances thereto belonging.

What Portion of Debtor's Property Has Been Conveyed by Deed of Assignment or Otherwise for Benefit of Creditors; Date of Such Deed, Name and Address of Party to Whom Conveyed; Amount Realized Therefrom and Disposal of Same, so Far as Known to Debtor

By Deed of Assignment dated Oct. 11, 1934, the petitioner deeded all of its property as above described to Louis R. Burkhart, P. O. Address, R. F. D. 3, Duncan, Okla., for the [fols. 295-320] Benefit of Creditors; and on the 21st day of January, 1935, Louis R. Burkhart, assignee and trustee for the benefit of creditors, sold at public auction and assigned and conveyed all of petitioner's property to the Pauline Oil & Gas Co., a corporation, for the sum of \$2,000, which sum Louis R. Burkhart, assignee and trustee for the benefit of creditors, now holds for distribution and disposal.

[fol. 321] **PLAINTIFF'S EXHIBIT 18, CASE NO. 8989, DISTRICT COURT**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6344

IN BANKRUPTCY

In the Matter of GERALDINE OIL COMPANY, a Corporation, Bankrupt

TRUSTEE'S FINAL REPORT

Comes now H. E. Beese, duly elected, qualified and acting Trustee of the assets and affairs of the above named bank-

rupt, and does hereby file his final report of his administration.

Your Trustee reports that he received the total sum of Two Thousand Five Hundred (\$2,500.00) Dollars, and charges his accounts therewith.

Your Trustee reports that pursuant to an order of July 30th, he paid the following claims:

Law Journal Publishing Company	\$3.00
Mame Bush for reporting testimony	3.15
Priest & Belisle for serving citations and telephone expense	4.35
Priest & Belisle, as attorneys for Trustee	200.00
Honorable Paul G. Darrough, Referee's commission	20.70
Jas. R. Eagleton, attorney for bankrupt	75.00
Oklahoma Tax Commission	78.25
Honorable Paul G. Darrough, Referee's Expense	22.35
Trustee's bond premium	10.00
Trustee's commission	90.00
Honorable Paul G. Darrough, Referee, filing claims	1.00
Pauline Oil & Gas Company, an only dividend, this being the only general claim filed and allowed	1992.20
Total disbursements	\$2500.00

[fols. 322-396] Wherefore, Having fully reported, your Trustee prays that his accounts may be allowed and approved and that he be discharged as such Trustee and his bondsmen released from further liability by reason of this trust.

H. E. Beese, Trustee. Priest and Belisle, Attorneys for Trustee.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

County of Oklahoma, ss:

H. E. Beese, being first duly sworn, on his oath, deposes and says that he is the Trustee above named; that he has read the above and foregoing Final Report, knows the

contents thereof and that the statements and allegations therein contained are true.

H. E. Beese.

Subscribed and sworn to before me this 6th day of August, 1936. Hazel Beatty, Notary Public. (Seal.)

My commission expires Oct. 11, 1939.

Endorsed: Filed Aug. 11, 1936. 9 A. M., Paul G. Darrough, Referee.

[fol. 397] DEFENDANT'S EXHIBIT 1, CASE No. 8989, DISTRICT COURT

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6344

IN BANKRUPTCY

In the Matter of GERALDINE OIL COMPANY, a Corporation,
Bankrupt

At Oklahoma City, in said District, on the 24th day of October, A. D. 1935, before the Honorable Edgar S. Vaught, Judge of said Court in Bankruptcy, the petition of Geraldine Oil Company, a corporation of Oklahoma City, in the County of Oklahoma and District aforesaid, that it be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Geraldine Oil Company, a corporation, is hereby declared and adjudged a bankrupt accordingly.

It is Therefore Ordered, That upon the petition filed in this Court by said bankrupt on the 23rd day of October, [fols 398-399] A. D. 1935, said matter be referred to Paul G. Darrough, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Geraldine Oil Company, a corporation, shall attend before said Referee on

the 25th day of October, A. D. 1935, at Oklahoma City, Oklahoma, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

Witness the Honorable Edgar S. Vaught, Judge of the said Court, and the seal thereof, at Oklahoma City in said District, on the 24th day of October, A. D. 1935.

Theodore M. Filson, Clerk, by Margaret P. Blair,
Deputy Clerk. (Seal of the Court.)

Edgar S. Vaught, District Judge.

[fol. 400] DEFENDANT'S EXHIBIT 2, CASE NO. 8989, DISTRICT COURT

Plaintiff's Exhibit 2 is Assignment for Benefit of Creditors; The body of the exhibit is the same as Exhibit A to the Answer and Cross Petition in this cause and is hereinbefore set out at page 19 of this casemade, but Plaintiff's Exhibit 2 has the additional endorsement showing recording in Pawnee County, which endorsement is as follows:

STATE OF OKLAHOMA,
Pawnee County, ss:

This instrument was filed for record on the 12 day of Oct., 1934, at 8:45 o'clock P. M. and recorded in Book 17 of C. M. page —.

J. M. Perry, County Clerk, by Mabel Riseling, Deputy.
(Seal.)

STATE OF OKLAHOMA,
Pawnee County, ss:

This instrument was filed for record on the 12 day of Oct., 1934 at 8:45 A. M. and recorded in Book 49 of Misc. Page 637.

J. M. Perry, County Clerk, by Mabel Riseling, Deputy.
(Seal.)

[fols. 401-406] DEFENDANT'S EXHIBIT 3

Defendant's Exhibit 3 in said cause was Assignment of Oil and Gas Lease from Louis R. Burkhart, Assignee for

Benefit of Creditors, to Pauline Oil and Gas Company; Said Assignment of Oil and Gas lease was attached as Exhibit D to the Answer and Cross Petition of the Defendant in this cause, and is hereinbefore set out at page 30 of this case made, and is not recopied at this point.

[fol. 407] IN DISTRICT COURT IN AND FOR PAWNEE COUNTY,
STATE OF OKLAHOMA

No. 8989

ABE FISCHER, Plaintiff,

vs.

PAULINE OIL & GAS COMPANY, a Corporation, Defendant

JOURNAL ENTRY OF JUDGMENT—Dec. 8, 1936

On the 7th day of December, 1936, the same being one of the regular juridical days of the July Term, 1936, of said court, this cause having been regularly set, came on for trial. The plaintiff was present in person and by his attorneys, Hunt & Eagleton, and Horace D. Ballaine. The defendant was present by its President, Mrs. Myrtle Burkhardt, its Secretary, O. T. Lowry, and its attorneys, T. G. Chambers and James R. Eagleton. The same was tried before a jury of twelve good men who being duly impaneled and sworn, well and truly to try the issues joined by the [fol. 408] plaintiff and defendant, and to render a verdict according to the evidence. The taking of evidence not having been completed by time of adjournment, said cause was recessed to December 8, 1936, at which time, the appearances were made as on the prior date. The taking of evidence was completed, the cause was submitted to the jury with directions to return a verdict for the plaintiff, the verdict was so returned and the verdict is approved by the court.

It is, Therefore, by the Court Considered, Ordered, Adjudged and Decreed That the plaintiff has the legal estate and equitable title in and to the producing oil and gas lease in, on and under the following described real estate, to wit:

All that portion of Lot Nine (9) in Section Thirty (30), Township Twenty-one (21) North, Range Nine (9) East of I. M. lying west of a line parallel to the west line of said Section and 1980 feet east thereof, all in Pawnee County, State of Oklahoma,

as well as all material, casing, tanks, buildings, powers, engines, machinery, pumps, pipe, lines, rods and all other property, fixtures and equipment on or in said real estate and/or used in connection with the production of oil and gas and in the operation of said property and is entitled to the immediate possession of said property, and,

It is Further Considered, Ordered, Adjudged and Decreed That the said plaintiff have and recover from said defendant the sum of \$1,142.27, with interest thereon at [fol. 409] 6% from December 8, 1936, together with costs of this action taxed at \$65.30, for which let execution issue;

It is Further Ordered That the said plaintiff be immediately let into possession of said premises and each and every part thereof and have possession of all of the personal property above set forth and the Clerk of this Court is ordered to issue a writ of assistance to the Sheriff of this County, directing him to place the said Abe Fischer in full possession thereof, and the said defendant and every person who has come into possession of said premises, or property, or any part thereof, under said defendant since the commencement of this action, shall upon the presentation of such writ of assistance, immediately deliver possession thereof to the said plaintiff, and that the refusal of said defendant or any one in possession of said premises or property, or any part thereof, under it, as aforesaid, to deliver immediate possession thereof to Abe Fischer shall constitute contempt of this court;

It is Further Considered, Ordered, Adjudged and Decreed That Abe Fisher, the plaintiff, is the legal owner of said premises and property, and each and every part thereof, and that his title thereto is valid and perfect and superior to any right or interest claimed by the defendant, and that said defendant has no right, title or interest in and to said property and premises, and that the title of said plaintiff in and to said premises, be and the same is hereby forever settled and quieted in the plaintiff as against all claims or demands of said defendant and those claiming or to claim [fol. 410] under it, and that the assignment for benefit of

creditors from the Geraldine Oil Company to Louis R. Burkhardt, as Trustee, dated October 11, 1934, recorded in the office of the County Clerk of Pawnee County, Oklahoma, on October 12, 1934, in Book 49 of Miscellaneous at page 637, and the assignment executed by Louis R. Burkhardt, assignee and trustee for benefit of creditors, to Pauline Oil and Gas Company, dated January 21, 1935, and recorded in the office of the County Clerk of Pawnee County, Oklahoma, on the 22 day of January, 1935, in Book 10 at page 327, and each of them, and all other deeds, assignments or documents in said chain of title claimed by said defendant be and the same are hereby cancelled and removed as clouds on the title of said plaintiff, Abe Fischer, in and to the above described premises;

It is Further Ordered, Decreed and Adjudged That the said defendant, Pauline Oil and Gas Company, and those claiming through, by or under it, be and they are hereby perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises by virtue of said conveyances, or either of them, hostile or adverse to the possession and title of plaintiff herein, and that the said Pauline Oil and Gas Company and those claiming under it are hereby perpetually forbidden and enjoined from commencing any suit to disturb the said plaintiff in his said possession and title to said premises, from setting up any claim or interest adverse to the title of the plaintiff herein, [fols. 411-433] and from disturbing plaintiff in his peaceable and quiet enjoyment of said premises and property, and

It is Further Adjudged That the Plaintiff Have and recover his costs, accrued and accruing, from the defendant, for which let execution issue.

To each and every of said orders and judgments, the defendant asked and was allowed exceptions.

Thurman S. Hurst, Judge.

Endorsed: Filed Dec. 22, 1936, Nora B. Harshbarger, Court Clerk.

[fol. 434] IN SUPREME COURT OF OKLAHOMA

No. 27931

PAULINE OIL & GAS. CO., Plaintiff in Error,

vs.

ABE FISCHER, Defendant in Error

MANDATE. D. C. 8989

The Supreme Court of Oklahoma:

To the Honorable Judge of the District Court of Pawnee County, in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 10th day of January 1929, render an opinion in the above entitled cause, appealed from the District Court of Pawnee County, Reversing the Judgment of the Trial Court.

Now, Therefore, you are hereby commanded to cause such Reversal to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Costs paid into this court \$25.00

Witness, the Honorable Wayne W. Bayless, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 16th day of May.

Andy Payne, Clerk, by Christine Ratliff, Deputy.
(Seal.)

IN SUPREME COURT OF OKLAHOMA

No. 27,931

PAULINE OIL & GAS COMPANY, Plaintiff in Error,

vs.

ABE FISCHER, Defendant in Error

SYLLABUS

1. When an Industrial Commission award in favor of an injured workman remains unpaid, and a lien is claimed

pursuant to section 13373 O. S. 1931, 85 Okl. St. Ann. sec. 49; and to enforce payment, the award is entered on the judgment docket of the District Court pursuant to section 13366, O. S. 1931, 85 Okl. St. Ann. Sec. 42, the award then "shall have the same force and be subject to the same law as judgments of the District Court," and thereby a lien, equivalent to a judgment lien, is impressed upon all of the property of the judgment debtor which would be subject to the lien of an original district court judgment, but property of the judgment debtor which would not be subject to judgment lien upon an original district court judgment, is not affected by such filing and entering of record of such award.

2. While an oil and gas lease which "grants, leases, and lets" certain land for oil and gas mining purposes, conveys to the lessee an estate in the realty described therein, such interest is not real estate within the meaning of section 690, C. O. S. 1921, which gives a judgment creditor a lien upon the "real estate" belonging to the judgment debtor.

3. A lien upon property obtained by issuance and levy of execution out of the state court, in less than four months preceding the filing in federal court of a bankruptcy petition by the judgment debtor who is insolvent, is nullified by the adjudication of bankruptcy, and a subsequent sheriff's sale on such execution passes no title to the purchaser.

4. A plaintiff seeking to quiet title and recover an oil and gas leasehold estate in lands, and certain materials, machinery, tools and appliances thereon, must recover, if at all, on the strength of his own title; and if his title is based on purchase at sheriff's sale on execution nullified by the intervening bankruptcy of the judgment debtor, then such plaintiff has no title and cannot recover.

Appeal from the District Court of Pawnee County. Hon. Thurman S. Hurst, Judge.

Action by Abe Fischer against Pauline Oil Company, a corporation, Judgment for Plaintiff, and defendant appeals.

Reversed

T. G. Chambers and James R. Eagleton, For Plaintiff in Error.

Hunt & Eagleton, Horace D. Ballaine, For Defendant in Error.

OPINION—Filed Jan. 10, 1939

WELCH, V. C., J.:

Abe Fischer, defendant in error, hereinafter referred to as plaintiff, commenced this action in the District Court of [fol. 435] Pawnee County against the Pauline Oil & Gas Company, a corporation, plaintiff in error, hereinafter referred to as defendant, to quiet title to an oil and gas lease, to recover materials, machinery, tools and appliances thereon, and possession of the premises covered by the lease, and for damages. Judgment was for the plaintiff and defendant brings appeal.

The plaintiff's claim of title is based upon a conveyance from the sheriff following a sale under execution growing out of an award of the Industrial Commission against the Geraldine Oil Company. The defendant's claim of title is based upon a conveyance from a trustee for the benefit of creditors, following an assignment to said trustee by the Geraldine Oil Company.

On August 30, 1934, the Industrial Commission granted an award to Sam Rainbolt against J. W. Snyder, employer, and the Geraldine Oil Company, the owner of the property involved, which company was secondarily liable for the award. On October 11, 1934, the Geraldine Oil Company made an assignment of the property to a trustee for the benefit of creditors.

On December 8, 1934, the award of the Industrial Commission in favor of Sam Rainbolt was filed of record in the district Court of Pawnee County.

On January 21, 1935, sale was made by the aforesaid trustee of the property involved herein to the defendant.

On September 13, 1935, execution was issued on the judgment in favor of Sam Rainbolt by virtue of the award obtained in the Industrial Commission, said execution out of the district court being directed to the properties of the Geraldine Oil Company; and on September 17, 1935, levy was made under said execution on the property involved herein.

On October 24, 1935, upon its voluntary petition, the Geraldine Oil Company was adjudged bankrupt in the United States District Court.

On November 12, 1935, sheriff's sale was made of the property involved, pursuant to the execution and levy afore-

mentioned; and following confirmation of said sale on June 10, 1936, sheriff's deed was issued to the purchaser, the plaintiff herein. On June 4, 1936, the United States District Court approved and confirmed the sale of said property made by the trustee for the benefit of creditors to the defendant on January 21, 1935.

Upon the pleadings, and after the introduction of all the evidence, the trial court directed a verdict for the plaintiff and assigned as his reason therefor that the judgment of the Industrial Commission constituted a lien upon all the property of the Geraldine Oil Company and that said lien was not destroyed by either the assignment for the benefit of creditors nor by the subsequent bankruptcy proceedings.

Since the right of plaintiff to recover depends on the strength of his own title, and since his title is assailed, we should first test the validity thereof.

It is plaintiff's theory that by purchase at the sheriff's sale he obtained title superior to the title of the former purchaser at the trustee's sale, and that although the levy on the property, as on execution, was in less than four months of bankruptcy, and the sheriff's sale was some weeks after bankruptcy, that his title was unaffected thereby. This theory is founded upon plaintiff's contention that a lien in favor of the judgment creditor existed prior to the assignment for the benefit of creditors, and that such lien continued in full force until the sheriff's sale and confirmation of sale, and that such lien was unaffected by anything that intervened. If that theory is sound the plaintiff rightfully recovered.

Upon the other hand, it is contended against plaintiff's title that no lien in favor of the judgment creditor had attached in October 1934, when the property assignment for the benefit of creditors was made, nor even in January 1935, when the trustee for creditors sold the property to the defendant. It is also asserted against plaintiff's title that since the sheriff's execution levy on the property was made in less than four months of bankruptcy, that the same was void by virtue of section 67, subdivision F of the bankruptcy act of 1898, as amended June 27, 1934, which in material part provides as follows:

"That all levies . . . or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in

bankruptcy against him, . . . shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy . . . shall be deemed wholly discharged and released from the same. . . ."

And if either of those contentions or theories is correct the plaintiff cannot prevail.

The Federal court in approving the sale theretofore made to the defendant by the trustee for creditors, seems to have proceeded upon the theory that the filing of the judgment for record in the District Court of Pawnee County did not create a lien on the property involved, and that no such lien existed since the judgment creditor had not up to the time [fol. 436] of such sale, followed the recording of the judgment with the issuing of any execution.

It is to be noted that although the judgment creditor filed his judgment for record in the district court of Pawnee County in December 1934, he did not follow with execution until nine months later, in September, while bankruptcy intervened the following October. And in the meantime, in January, the trustee for creditors had sold the property pursuant to assignment theretofore made the preceding October.

The authority of such a judgment creditor to proceed by recording judgment and issuing execution is found in section 13366, O. S. 1931, 85 Okl. St. Ann. Sec. 42, which reads in part as follows:

"If payment of compensation or an installment thereof due under the terms of an award, except in case of appeals from an award, be not made within ten days after the same is due by the employer or insurance carrier liable therefor, the Commission may order a certified copy of the award to be filed in the office of the Court Clerk of any county, which award whether accumulative or lump sum shall be entered on the judgment docket of the district court, and shall have the same force and be subject to the same law as judgments of the District Court. Upon the filing of such certified copy of the Commission's award a writ of execution shall issue and such process shall be executed and the cost thereof taxed, as in the case of writs of execution, on judgments of courts of record, as provided by the code of civil procedure. . . ."

It seems clear from the language of the Act that the force and effect of such a judgment so filed and recorded is the

same, as respects the questions here involved, as the rendering and recording of a district court judgment.

In *First National Bank of Healdon v. Dunlap*, 122 Okla. 288, 254 Pac. 729, this court held that the rendering and recording of a district court judgment did not create a lien upon an oil and gas lease, and the sale of same by the judgment debtor before issuance and levy of execution, passed title clear of any lien.

To be consistent with that authority we must hold that the judgment creditor here obtained no lien on this property merely by the filing of his judgment for record in the office of the court clerk.

Then it would follow that no lien attached until execution was issued and levied on this property. That occurred in September, 1935. But the former owner and execution debtor became a bankrupt in October 1935, and the lien by levy was nullified by the provision of the Bankruptcy Act above cited. The effect of that Act is succinctly stated in *Remington on Bankruptcy*, Vol. 4, p. 682, sec. 1857, as follows:

"All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy."

The former owner of this property was insolvent, and had been since October 1934, when the assignment for creditors was made, and was in due course adjudged a bankrupt. Then the sheriff's sale subsequently made conveyed no title to plaintiff, and he had no title and had no right to prevail in the trial court.

This is true, even if defendant did not acquire any title to the property by purchase from the Trustee in January 1935. It is therefore not necessary that we determine the validity of that trustee sale to pass title.

The plaintiff also relies upon section 13373, O. S. 1931, 85 Okl. St. Ann. Sec. 49, which is as follows:

"The right of compensation granted by this act, and any claim for unpaid compensation insurance premium shall have the same preference or lien, without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor."

Plaintiff asserts that thereby the lien of the judgment creditor attached from the time Rainbolt commenced proceedings to collect his award by filing his judgment for record in the district court.

It is to be noted here that Snyder, and not the Geraldine Oil Company, was the "employer" of Rainbolt. That company was only secondarily liable to Rainbolt and such secondary liability could be enforced only after exhausting execution on the primary liability. (Sec. 13351, O. S. 1931, 85 Okl. St. Ann. Sec. 11). Assuming, but not deciding, that [fol. 437] the Geraldine Oil Company would be included in the designation "employer" in section 13373, *supra*, still this contention of plaintiff cannot be sustained.

Section 13373, *supra*, purports to grant a lien the same as a lien "for wages for labor." That latter lien is provided for in section 11007, O. S. 1931, 42 Okl. St. Ann. Sec. 92, and is enforceable in the specific manner provided by the next following sections. Enforcement of such lien by laborers in the manner specified is essential to preserve the right to such lien, *McGuyre v. Duncan*, 100 Okla. 217, 229 Pac. 199, and that rule likewise applies to claimants for unpaid compensation insurance premiums, who assert a lien under section 13373, *supra*, *Pacific Petroleum Co. v. Sunbeam Oil Co.* 176 Okla. 293, 54 Pac. (2d) 1054. It would therefore seem that section 11007, *supra*, and section 13373, *supra*, are not self executing but must be read in connection with the methods provided for enforcement of the liens therein mentioned.

The judgment creditor here proceeded to enforce his lien or his right to collect from the Geraldine Oil Company by filing his award or judgment in the District Court pursuant to section 13366, *supra*. While the plaintiff contends the lien mentioned in section 13373, *supra*, attached to all property from such filing of the judgment, we are convinced that the effect of such filing of the judgment is tested by the provisions of the section (13366, *supra*) which authorizes such procedure. There it is provided that such a judgment or award so filed and entered upon the district court records "shall have the same force and be subject to the same law as judgments of the district court." This contention of plaintiff would accept all of the benefits of filing an award in the district court to obtain for it the status of a district court judgment, but would avoid the fixed limitations of such a status.

When this award was filed and entered on the judgment docket of the district court and thereby gained the status of a district court judgment, and had "the same force" and was "subject to the same law as judgments of the district court", it thereby impressed a lien on all property upon which a district court judgment would impress a lien, and as to property upon which a district court judgment would not impress a lien, such filing of this award likewise would not impress a lien. We think no other logical result can be reached from the language of the statutes. Therefore this contention of the plaintiff cannot be sustained.

There is some language in plaintiff's brief indicating a contention, in substance, that a lien in favor of Rainbolt for compensation mentioned in section 13373, supra, attached to all of the property of the Geraldine Oil Company from the time Rainbolt commenced proceedings to enforce his right of compensation under the Workmen's Compensation Act. That contention could not be sound for the reasons heretofore stated, and because no such provision or legislative intent can be found from the statutes. If that position could be sound, then any purchaser of an item or real or personal property, however insignificant, would be under the burden of ascertaining whether his vendor was the employer of labor, or might be liable primarily or secondarily on any workmen's compensation claim in any manner pending before the Industrial Commission.

We conclude that the claimant, Rainbolt, obtained no lien on the property here involved by the commencement of his proceedings before the Industrial Commission to enforce his right of compensation; nor by the filing and entering of the award in the records of the district court; and that whatever lien he obtained by levy of execution was obtained within four months of bankruptcy of the judgment debtor, and was therefore nullified by the bankruptcy act, and that the subsequent sheriff's sale on that execution conveyed no title to the plaintiff.

It follows that the plaintiff had no title and no right to recover, and the trial court erred in rendering judgment for the plaintiff.

That judgment is reversed, and the cause remanded, with directions to enter judgment denying the plaintiff any relief.

Bayless, C. J. Riley, Osborn, Corn, Gibson, Davison and Danner JJ. Concur.

Hurst, J., Not Participating.

[fol. 438] Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

Filed in the District Court, Pawnee County, Oklahoma, May 17, 1939. Nora B. Harshbarger, Court Clerk, by Ethel Traver, Deputy.

[fol. 439] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

[File endorsement omitted]

PETITION FOR REHEARING—Filed Jan. 20, 1939.

Comes now Abe Fischer, defendant in error, and prays the Court to grant a rehearing in the above cause and withdraw the opinion filed herein on the 10th day of January, 1939, written by Mr. Justice Weleh, and as reasons therefor states:

Second

The opinion misconstrues Sec. 67 (f) of the Bankruptcy Act in holding that the lien of levy was nullified thereby in that it entirely overlooks the fact: (a) That this property never passed to the trustee in bankruptcy nor became a part of the bankrupt estate; (b) Liens avoided by Sec. 67 (f) are not avoided against the whole world, but only against the trustee; (c) Liens avoided by Sec. 67 (f) are not void but merely voidable by the trustee and will stand unless attacked by him in a proper suit.

Third

The opinion overlooks the final judgment of the District Court of Pawnee County, Oklahoma, which confirmed the sheriff's sale. The objections to the sheriff's sale presented by the trustee in bankruptcy to the District Court of Pawnee County, Oklahoma, adjudicated adversely the right of the [fols. 440-451] trustee in bankruptcy to the property. This matter became res adjudicata, a fact entirely undisposed of and overlooked by the opinion.

Fifth

The opinion overlooked the fact that the bankruptcy court was without jurisdiction in a summary proceeding to make any adjudication as to the title of this lease. The lease was neither actually nor constructively in the possession of the trustee in bankruptcy.

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[fol. 452] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—April 4, 1939

27,931—Pauline Oil & Gas Co. v. Abe Fischer. Petition for rehearing and motion for oral argument thereon, denied. Hurst, J., not participating.

[fol. 453] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

[File endorsement omitted]

APPLICATION FOR PERMISSION TO FILE SECOND PETITION FOR REHEARING—Filed April 10, 1939

The defendant in error by the determination in this cause has been divested of valuable property rights by the misapplication and misinterpretation of the bankruptcy laws of the United States; if the opinion written in this cause is permitted to stand, Abe Fischer will have been divested of valuable property rights without a trial, without the submission of the question of fraud to a jury; he will have lost his property on a misinterpretation of the bankruptcy laws without having had a trial of the facts pertaining to the controversy;

In this opinion this court has held that an adjudication of bankruptcy in a bankruptcy proceedings divests the state court of jurisdiction of property which is in the possession of the sheriff on an execution, the legal title to which property is held by a third party, a party other than the

one adjudicated to be a bankrupt; the defendant in error alleged that the property was fraudulently held, had been conveyed to the then owners in fraud of creditors of the Geraldine Oil Company; the Geraldine Oil Company is the company that was adjudicated in bankruptcy; the trustee in bankruptcy did not claim title to and did not take possession of this physical property but disclaimed any interest therein;

The decision in this case determines that defendant in error is not entitled to try the question of the fraud of the [fol. 454] Geraldine Oil Company, the assignee for benefit of creditors of the Geraldine Oil Company and the Pauline Oil & Gas Company, for the reason that under Sec. 67 (f) of the Bankruptcy Act all liens acquired within four months of bankruptcy are avoided by the adjudication of bankruptcy. This is an erroneous application of the bankruptcy law, for if the writer of the opinion had perused Remington on Bankruptcy further he would have found at Sec. 1876 thereof the following exception to that rule:

“Second Element Requisite to Nullify Liens by Legal Proceedings.—The lien must have been obtained upon property which otherwise would have gone into the bankrupt's estate to swell the trust fund for all creditors, or upon exempt property, or upon property affected by some transfer or lien which itself in turn is void under state law as to the lien by legal proceedings concerned or is inferior in priority thereto.”

Remington on Bankruptcy, Sec. 1876 at page 703.

The property involved in this suit was at the time of the adjudication of bankruptcy in the possession of the sheriff of Pawnee County. The legal title thereto was in the Pauline Oil & Gas Company which was not in bankruptcy. The trustee in bankruptcy did not presume to avail himself of this property but disclaimed this property. The defendant in error herein was not a party to the bankruptcy proceedings. His rights in and to this property were not therein adjudicated and could not be so adjudicated if the Supreme Court of the United States has properly applied the law to a like situation. See *Taubel-Scott-Kitzmiller Company, Inc., v. Fox, et al.*, 68 L. Ed. 770, 264 U. S. 426. A former grantee, such as the Pauline Oil & Gas Company is in this case, cannot plead and rely

upon the bankruptcy to sustain its title, for, as was held in *Hutchins vs. Cantu* (Tex. Civ. App. 1902), 66 S. W. 138, although a sale of land on execution within four months before the defendant's adjudication in bankruptcy may be [fol. 455] avoided by his trustee, its nullity cannot be pleaded by a former grantee of the same property. The same rule is likewise stated as follows in 8 C. J. S. 904:

"* * * that the lien is void only as to the assets to be administered in bankruptcy, and not as to property which does not pass to the trustee in bankruptcy."

See also 6 Am. Jur. 698 which reads:

"The lien must have been obtained upon property which otherwise would have gone into the bankrupt's estate to swell the trust fund for all creditors, or upon exempt property."

In fact, Sec. 67 (f) immediately after that part quoted by the court in the opinion goes on to read:

"* * * and shall pass to the trustee as a part of the estate of the bankrupt (unless the court shall order the lien preserved for the benefit of the estate)."

See also 8 C. J. S. 910:

"Levies and liens acquired through legal proceedings, within the four-month period, are avoided, under the provisions of Bankruptcy Act #67 c (11 U. S. C. A. #107 (c)) and #67 f (11 U. S. C. A. #107 (f)), not as against all the world, but only as against the trustee in bankruptcy and those claiming through or under him, and these provisions generally may be availed of by the trustee only, for the benefit of the bankrupt estate * * *. Such a lien is not avoided, under these provisions, as against the bankrupt himself or his assignee, even though the trustee has not asserted title to the bankrupt's property; * * *"

and 6 Am. Jur. 698:

"The effect of the statute is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under

him, so that the property may pass to, and be distributed by, him among the creditors of the bankrupt."

If the erroneous opinion which has been written stands in this case, defendant in error will have been divested of substantial property without a trial of the fraud perpetrated by the Geraldine Oil Company and its associates, they have successfully negotiated the shroud of protection at the hands of the bankruptcy court and will have successfully obtained the protection of this court to that same fraud.

Respectfully submitted,
Hunt & Eagleton, Horace D. Ballaine, Attorneys for
Defendant in Error.

[fol. 456] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING APPLICATION FOR LEAVE TO FILE SECOND
PETITION FOR REHEARING—May 16, 1939

27,931—Pauline Oil & Gas Co. v. Abe Fischer. Application for leave to file second petition for rehearing denied.

[fol. 457] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed May 17, 1939

It appearing that defendant in error has presented application and intention to file with Supreme Court of the United States petition for certiorari,

Now, Therefore, It Is Ordered, that all proceedings on the mandate issued in the above styled and numbered cause on the 16th day of May, 1939, be stayed for a period of thirty days from this date.

Dated this 17th day of May, 1939.

Wayne W. Bayless, Chief Justice.

[fol. 458] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed June 14, 1939

It appearing that an order was entered in the above styled and numbered cause on the 17th day of May, 1939, whereby all proceedings in the trial court were ordered stayed for a period of thirty (30) days from that date in order to enable the defendant in error to perfect an appeal to the Supreme Court of the United States; and it appearing that application has now been made for an additional stay of fifteen days,

It Is Therefore Ordered and Adjudged that the order entered herein on the 17th day of May, 1939, be continued in force and effect for an additional time of fifteen days from the 16th day of June, 1939, and all proceedings in the trial court are ordered stayed for such time.

Dated this 14th day of June, 1939.

Earl Welch, Vice Chief Justice.

[fol. 459] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

NOTICE OF APPEAL—Filed June 30, 1939

The Pauline Oil & Gas Company, plaintiff in error in the above entitled cause, is hereby notified that Abe Fischer, the defendant in error, appeals from the decree of the Supreme Court of Oklahoma as rendered on January 10, 1939 (Petition for Rehearing on which was denied on April 4, 1939, and Application for Permission to File Second Petition for Rehearing thereon denied on May 16, 1939), and that said appeal will be to the Supreme Court of the United States in accordance with the citation as issued in this case.

Claude H. Rosenstein, Hunt & Eagleton, Horace Balaïne, Attorneys for Abe Fischer, Defendant in Error.

Service of the above Notice of Appeal accepted this 30th day of June, 1939.

James R. Eagleton, T. G. Chambers, Attorney- for
Plaintiff in Error, Pauline Oil & Gas Company.

[fol. 460]- [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

**Petition for Appeal, Assignments of Error and Prayer for
Reversal—Filed June 30, 1939**

PETITION FOR APPEAL

To the Honorable Chief Justice of the Supreme Court of
the State of Oklahoma:

Your petitioner, appellant in the above entitled cause and defendant in error in the Supreme Court of the State of Oklahoma in cause No. 27,931, Pauline Oil & Gas Company, a corporation, plaintiff in error, vs. Abe Fischer, defendant in error, considering himself aggrieved by the final decision and judgment of the Supreme Court of Oklahoma entered on January 10, 1939 (petition for rehearing denied April 4, 1939; application for permission to file second petition for rehearing denied May 16, 1939) in said cause last mentioned, desires that an appeal be allowed to the Supreme Court of the United States and in this connection shows:

I

As will appear, the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error;

II

The petition will be accompanied by an assignment of errors (which will be embodied herein) and statement as to the jurisdiction;

III

In this case the Supreme Court of the State of Oklahoma decided a Federal question of substance not theretofore determined by this court and in a manner probably not [fol. 461] in accord with applicable decisions of this court. The facts herein reflect that the Supreme Court of the State of Oklahoma held that under the provision of Sec. 67f of the Bankruptcy Act the adjudication of bankruptcy of the debtor automatically voided a levy of execution issued against said debtor on property which theretofore had been conveyed by the debtor to an assignee for benefit of creditors and by the assignee sold and delivered to a purchaser at a sale held by assignee for benefit of creditors; at the time of the levy of the execution the property was in the possession of the purchaser at the assignee's sale. The decision complained of holds that the purchaser at the sheriff's sale took nothing by his purchase and was thus foreclosed by reason of his lack of interest in the property to try the issue of whether or not fraud inhered in the assignment for the benefit of creditors, the assignee's sale and the bankruptcy proceedings. The trustee in bankruptcy elected not to attempt to take possession of this lease as an asset of the bankruptcy estate.

Fischer purchased the oil and gas lease involved in the proceedings at a sheriff's sale held under a general execution issued against the Geraldine Oil Company, brought this suit in ejectment; to quiet title in and to the lease and for damages against the Pauline Oil & Gas Company which was in possession of the lease and held record title thereto through a purported purchase thereof from one Burkhardt, who was then the assignee for the benefit of the creditors of the Geraldine Oil Company. The Pauline Oil & Gas Company by answer pleaded its title through the assignee for benefit of creditors and the bankruptcy proceedings of the Geraldine Oil Company, the adjudication of bankruptcy was immediately proceeding the date of the sheriff's sale, and asked to have its title quieted in and to the lease. The plaintiff filed reply pleading the fraud which inhered in the proceedings in and under the assignment for benefit of creditors and the bankruptcy proceedings. The cause was [fol. 462] tried to a jury. The trial court directed a verdict for Fischer. On appeal the Supreme Court of Oklahoma held that the verdict was improperly directed for the plain-

tiff and that judgment should have been entered for the Pauline Oil & Gas Company for the reason that the adjudication of bankruptcy voided the levy of execution which was within four months of the adjudication and hence Fischer obtained no interest in the lease upon which to predicate the suit for possession, to quiet title, and damages. The effect of this interpretation of the application of Sec. 67f of the Bankruptcy Act is to divest Fischer of the title to this property without a trial of the issue of fraud, even though the trustee in bankruptcy did not attempt to administer this lease but in substance elected to disclaim it. The bankrupt estate had and obtained and claimed no interest in and to this lease, yet under the decision of the Supreme Court of Oklahoma which is complained of the Pauline Oil & Gas Company, which did not take title from the trustee in bankruptcy, was allowed to assert the destruction of the levy of execution on the lease by reason of the adjudication of bankruptcy, though the trustee had elected not to claim the property.

IV

ASSIGNMENTS OF ERROR

Appellant assigns the following errors in the record and proceedings:

1. The Supreme Court of Oklahoma erred in holding that Sec. 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) voids a levy obtained within four months of bankruptcy on a piece of property under a general execution issued against the judgment debtor when: a. The title of the property is held by a third person; b. The property at the time of the levy was not in the possession of the bankrupt; c. The property levied upon is neither actually or constructively in the possession of the bankrupt or the trustee in bankruptcy.

[fol. 463] 2. The Supreme Court of Oklahoma erred in holding that Sec. 67f of the Bankruptcy Act (11 U. S. C. A. Sec. 107 as amended) avoids a levy obtained within four months of bankruptcy upon a property under a general execution issued against the debtor, who later was adjudicated a bankrupt, when the property levied upon was neither actually nor constructively in the possession of the bankrupt.

3. The Supreme Court of Oklahoma erred in holding that under the provision of Sec. 67f of the Bankruptcy Act (11 U. S. C. A. Sec. 107 as amended) the levy of a general execution issued against the Geraldine Oil Company on an oil and gas lease, title and possession of which was in the Pauline Oil & Gas Company, which company had purchased it from the assignee for benefit of creditors of the Geraldine Oil Company, was voided by the adjudication of bankruptcy against the Geraldine Oil Company within four months after the execution levy was made and thus foreclosing Fischer, the purchaser at the sheriff's sale, from establishing, in a suit between Fischer and the Pauline Oil & Gas Company, the fraud inhering in the proceedings of the assignment for benefit of creditors and bankruptcy in support of his title to the said oil and gas lease.

4. The Supreme Court of Oklahoma erred in holding in effect that the referee in bankruptcy had jurisdiction in a summary proceeding to determine title to the property herein questioned when possession of the property was neither actually nor constructively in either the trustee in bankruptcy or the bankrupt.

5. The Supreme Court of Oklahoma erred in holding that Sec. 67f of the Bankruptcy Act (11 U. S. C. A. Sec. 107 as amended) operated to avoid a lien of levy acquired within four months of the adjudication upon property which the trustee neither took possession of nor administered.

6. The Supreme Court of Oklahoma erred in holding that the Pauline Oil & Gas Company, which did not take title [fol. 464] from or through the trustee in bankruptcy of the Geraldine Oil Company, could avail itself of the benefits of the provision of Sec. 67f of the Bankruptcy Act (11 U. S. C. A. Sec. 107 as amended) and thus defend its purported title obtained long prior to the bankruptcy proceedings against Fischer who purchased the property at an execution sale, which execution was levied upon the oil and gas lease involved within four months of the adjudication of bankruptcy of the judgment debtor, the Geraldine Oil Company.

V

PRAYER FOR REVERSAL

Wherefore, your petitioner prays:

1. That an appeal be allowed herein from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States and that said judgment of the Supreme Court of Oklahoma dated January 10, 1939, on which rehearing was denied on April 4, 1939, and application for permission to file second petition for rehearing was denied on May 16, 1939, be reversed and it be held that the adjudication of bankruptcy of the Geraldine Oil Company did not avoid as between Fischer and the Pauline Oil & Gas Company the levy and lien of levy of execution under execution issued against Geraldine Oil Company and that said cause be reversed and returned to the trial court for further proceedings.
2. That the court fix the amount of the cost bond to be given by appellant.
3. For such further and other relief to which appellant may be entitled.

Claude H. Rosenstein, Hunt & Eagleton, Horace Bala-
laine, Attorneys for Appellant.

Received service of copy of above petition this 30th day
of June, 1939.

James R. Eagleton, T. G. Chambers, Attorneys for
Appellee.

[fol. 465] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 30, 1939

The appellant in the above entitled suit having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Oklahoma January 10, 1939, (Petition for Re-

hearing of which was denied on April 4, 1939, and Application for Permission to File Second Petition for Rehearing thereon denied (May 16, 1939) and from each and every part thereof and having presented and filed his Petition for Appeal, Assignment of Errors, prayed for reversal and statement as to jurisdiction pursuant to the statutes and the rules of the Supreme Court of the United States in such cases made and provided:

It Is Hereby Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Oklahoma in the above entitled cause as provided by law; and,

It Is Further Ordered that the Clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court in less than forty days from this date; and,

It Is Further Ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars (\$500.00).

Dated this 30th day of June, 1939.

Wayne W. Boless, Chief Justice of the Supreme Court of Oklahoma and Presiding Justice.

Received service of copy of above order this 30th day of June, 1939.

James R. Eagleton, T. G. Chambers, Attorneys for Appellee. t

[fol. 466] Citation, in usual form, showing service on James R. Eagleton et al., filed June 30, 1939, omitted in printing.

[fols. 467-468] Bond on appeal for \$500.00, approved and filed June 30, 1939, omitted in printing.

[fol. 469]

[File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 30, 1939

The Clerk is requested to prepare and forward to the Clerk of the Supreme Court of the United States a transcript of record on appeal which shall include only the following portions of the record:

1. The Petition (without exhibits) of Abe Fischer filed in the Pawnee County District Court. C. M. pp. 2 to 5.
2. The Answer and Cross-petition filed by the Pauline Oil & Gas Company (without exhibits). C. M. pp. 12 to 18.
3. The Reply to Answer and Answer to Cross-petition (without exhibits) filed by Abe Fischer. C. M. pp. 37 to 41.
4. Amendment to Answer and Answer to Cross-petition. C. M. pp. 50, 51.
5. Oral request of Mr. Chambers for permission to amend answer and order entered thereon. C. M. p. 53.
6. Execution under which property was sold to Fischer, without exhibits. C. M. p. 242.
7. Sheriff's return on execution under which lease was sold to Abe Fischer. C. M. pp. 252, 253.
8. Sheriff's deed conveying lease to Abe Fischer. C. M. pp. 6 to 10 (as referred to in C. M. p. 261).
9. Assignment for Benefit of Creditors. C. M. pp. 19 to 21 (as referred to in C. M. p. 400).
10. Assignment of oil and gas lease by Louis R. Burkhart to Pauline Oil & Gas Company. C. M. pp. 30 to 32 (as referred to in C. M. p. 401.)
- [fol. 470] 11. Adjudication of Bankruptcy of Geraldine Oil Company. C. M. pp. 397, 398.
12. Order Approving Assignment to Pauline Oil & Gas Company by referee in bankruptcy. C. M. pp. 34, 35.
13. Schedules B.1 and B.2 attached to Geraldine Oil Company bankruptcy petition. C. M. pp. 290 to 292.
14. That part of Schedule B.4 attached to Geraldine Oil Company bankruptcy petition pertaining to the assignment for benefit of creditors and sale thereunder. C. M. pp. 294, 295.
15. Trustee's final report in the matter of the bankruptcy of the Geraldine Oil Company. C. M. pp. 321, 322.

16. Plaintiff's Exhibit 14 in the case No. 8989 in the District Court of Pawnee County, being a check for \$2500.00 paid to Louis R. Burkhart, assignee, as purchase price of the lease in question by the Pauline Oil & Gas Company, and all endorsements thereon. C. M. p. 275.

17. That part of the testimony of witness O. T. Lowry pertaining to the execution and consideration for plaintiff's exhibit 14. C. M. pp. 88, 89, 90.

18. Journal Entry of Judgment of trial court. C. M. pp. 407 to 411.

19. Petition in Error filed with and attached to C. M.

20. The opinion prepared by Vice-Chief Justice Welch for the Supreme Court of Oklahoma in case No. 27,931 filed on January 10, 1939, in said Court.

21. That portion of petition for rehearing filed in the Supreme Court of Oklahoma by Abe Fischer contained in paragraphs numbered Second, Third and Fifth.

22. Order of Supreme Court of Oklahoma under date of April 4, 1939, denying Petition for Rehearing.

23. Application for Permission to File Second Petition for Rehearing filed in Supreme Court of Oklahoma by Abe Fischer.

24. Order of Supreme Court of Oklahoma under date of May 16, 1939, denying Application for Permission to File Second Petition for Rehearing.

[fol. 471]. 25. Mandate.

26. Order of Supreme Court of Oklahoma staying proceedings on Mandate for a period of thirty days from the 17th day of May, 1939.

27. Order of the Supreme Court of Oklahoma under date of June 14, 1939, granting an additional fifteen days from the 17th day of June, 1939, to enable Abe Fischer to perfect an appeal to the Supreme Court of the United States.

28. Petition for Appeal, Assignment of Errors, and Prayer for Reversal and Acceptance of Service thereof.

29. Order Allowing Appeal and Acceptance of Service thereof.

30. Jurisdictional Statement and Acceptance of Service thereof.

31. Citation and Acknowledgment of Service thereof.

32. Notice of Appeal and Acknowledgment of Service thereof.

33. Bond for Costs.

34. Praecept for Transcript of Record and Acceptance of Service thereof.

35. Statement of points to be relied upon by appellant and Acknowledgment of Service thereof.

Dated this 30 day of June, 1939.

Claude H. Rosenstein, Hunt & Eagleton, Horace Balaïne, Attorneys for Appellant.

Received service of copy of this praecipe for transcript of record this 30th day of June, 1939.

James R. Eagleton, T. G. Chambers, Attorneys for Appellee.

[fol. 472] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 473] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT AND ACKNOWLEDGMENT OF SERVICE THEREOF—Filed July 28, 1939

Comes now the appellant and states that the points upon which he is to rely in this court are as follows:

Point 1: That the Supreme Court of Oklahoma erred in holding under the facts in this cause that the adjudication of bankruptcy automatically voided the levy of execution on the oil and gas lease involved, even though said levy was made within four months of bankruptcy, for the reason that the oil and gas lease was not and for four months prior to bankruptcy had not been in the possession of the Geraldine Oil Company and the title thereto was not in the Geraldine Oil Company. The property was not and at no time came actually or constructively into the possession of the trustee in bankruptcy of the Geraldine Oil Company and was not administered by the trustee in bankruptcy.

Point 2: The provision of Sec. 67f of the Bankruptcy Act voiding liens obtained within four months of the adjudication of bankruptcy is not self operating, and such lien is not automatically voided, but the trustee must bring an action to avoid such lien, which was not done in this case.

Point 3: The referee in bankruptcy did not have jurisdiction to make any order affecting the title to the lease in

question in a summary proceeding for the reason that the property was not actually nor constructively in the possession of the bankruptcy court and Fischer was not a party to said proceeding.

[fol. 474] Point 4: Sec. 67f of the Bankruptcy Act is for the benefit of the bankrupt estate and can be taken advantage of only by the trustee in bankruptcy or those claiming under him, and liens obtained upon property of the bankrupt which is not administered by the trustee in bankruptcy are not voided thereby.

Claude H. Rosenstein, Hunt & Eagleton, Horace Ballaine, Attorneys for Appellant.

Service of the above statement of points to be relied upon by the appellant is acknowledged by the appellee this 30th day of June, 1939.

James R. Eagleton, T. G. Chambers, Attorneys for Appellee.

[fol. 474½] [File endorsement omitted.]

[fol. 475] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANT OF PARTS OF THE RECORD HE THINKS NECESSARY FOR CONSIDERATION—Filed August 7, 1939

The appellant believes that the parts of the record necessary for the consideration of this appeal are of those items numbered and listed in his Praecipe for Transcript of Record herein filed.

Claude H. Rosenstein, Hunt & Eagleton, Horace D. Ballaine, Attorneys for Appellant.

I acknowledge service of the above "Statement of Appellant of Parts of the Record He Thinks Necessary for Consideration"

T. G. Chambers, James R. Eagleton, Attorneys for Appellee.

[fol. 475½] [File endorsement omitted.]

[fol. 476] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 9, 1939

Appeal from the Supreme Court of the State of Oklahoma.
Treating the appeal papers herein from the Supreme Court of the State of Oklahoma as a petition for writ of certiorari;

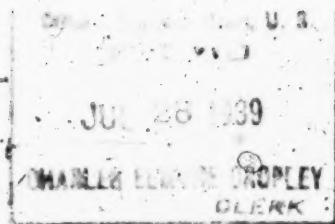
On Consideration Whereof, it is ordered by this Court that the said petition for writ of certiorari be, and the same is hereby, granted.

Mr. Justice Butler took no part in the consideration and decision of this case.

Endorsed on cover: Enter Claude H. Rosenstein. File No. 43,646, Oklahoma Supreme Court. Term No. 239. Abe Fischer, Appellant, vs. Pauline Oil & Gas Company. Filed July 28, 1939. Term No. 239 O. T., 1939.

(4623)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 239

ABE FISCHER,

vs.

Appellant,

PAULINE OIL & GAS COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

CLAUDE H. ROSENSTEIN,

HORACE BALLAINE,

Counsel for Appellant.

HUNT & EAGLETON,

Of Counsel.

INDEX

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions believed to sustain the jurisdiction	1
Federal statute involved	2
Date of the opinion	3
Date of application for appeal to the Supreme Court of the United States	3
Nature of case, including a statement of the grounds upon which it is contended that the questions involved are substantial	4
The Federal questions are substantial	7
How Federal questions were raised in the first instance in the appellate court and the way in which they were passed upon by the same court	8
Exhibit "A"—Mandate and opinion of the Supreme Court of the State of Oklahoma	11

TABLE OF CASES CITED.

<i>Casady & Co. v. Hartzell</i> , Iowa, 151 N. W. 97	8
<i>Coker v. Utter</i> , Ga., 108 S. E. 538	8
<i>Connell v. Walker</i> , 291 U. S. 1, 78 L. Ed. 613	8
<i>Dickens v. Breedlove</i> , Ga., 129 S. E. 886	8
<i>Equitable Credit Company v. Miller</i> , Ga., 137 S. E. 771	8
<i>Frazee v. Nelson</i> , Mass, 61 N. E. 40	8
<i>Hutchins v. Cantu</i> , Texas Civil Appeals, 66 S. W. 138, 8 C. J. S. 904, 6 Am. Jr. 698	8
<i>Kobrin v. Drazin</i> , N. J., 128 Atl. 796	8
<i>McCarty v. Light</i> , 139 N. Y. S. 853	8
<i>McKenney v. Cheney</i> , Ga., 45 S. E. 433	8
<i>Martin v. Greenlake State Bank</i> , Minn., 208 N. W. 21	8
<i>Miller v. Equitable Credit Co.</i> , Ga., 138 S. E. 282	8

<i>Neugent Garment Co. v. U. S. F. & G.</i> , Wisc., 231 N. W. 600	8
<i>Pigg & Sons v. U. S.</i> , 81 F. (2d) 334	8
<i>Taubel-Scott-Kitzmiller Co. v. Fox</i> , 264 U. S. 426, 68 L. Ed. 770	8
<i>Walker v. Connell</i> , N. Dak., 249 N. W. 726, 291 U. S. 1	8

STATUTES CITED.

Bankruptcy Act, Section 67f (Chapter 541, Sec. 67, 30 Stat. 564; as amended Chapter 487, Sec. 16, 32 Stat. 800; Chapter 412, Sec. 12, 36 Stat. 842, Chapter 424, Sec. 5, 48 Stat. 924) (U. S. C. A., Title 11, Sec. 107, as amended)	1, 2
Judicial Code, Section 237 b and c, as amended by Chapter 14, 45 Stat. 54, 45 Stat. 466 (U. S. C. A., Remington on Bankruptcy, Sec. 1876, page 703 Title 28, Sec. 344, as amended)	2 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 239

ABE FISCHER,

Appellant,

vs.

**PAULINE OIL & GAS COMPANY,
A CORPORATION.**

JURISDICTIONAL STATEMENT.

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

In this suit there is drawn in question the interpretation of Sec. 67f of the Bankruptcy Act (Chapter 541, Sec. 67, 30 Stat. 564; as amended Chapter 487, Sec. 16, 32 Stat. 800; Chapter 412, Sec. 12, 36 Stat. 842; Chapter 424, Sec. 5, 48 Stat. 924) (U. S. C. A. Title 11, Sec. 107 as amended) by the Supreme Court of the State of Oklahoma.

The appellant contends that the Supreme Court of Oklahoma misinterpreted this said statute and by this misinterpretation of the Federal statute which was in effect prior to January 31, 1938, the appellant was deprived of his title to

a certain oil and gas lease. The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States are subdivisions b and c of Sec. 237 of the Judicial Code and chapter 14, 45 Stat. 54, 45 Stat. 466 (U. S. C. A. Title 28, Sec. 344 as amended), the pertinent provisions of which are:

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States . . . If a writ of appeal be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the appeal was allowed."

II.

Federal Statute Involved.

The basic Federal statute involved is Sec. 671 of the Bankruptcy Act (Chapter 541, Sec. 67, 30 Stat. 564, as amended; Chapter 487, Sec. 16, 32 Stat. 800; Chapter 412, Sec. 12, 36 Stat. 842; Chapter 424, Sec. 5, 48 Stat. 924) (U. S. C. A. Title 11, Sec. 107 as amended) and reads as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, and

any bond which may be given to dissolve any such lien so created, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, and any non-exempt property of his which he shall have deposited or pledged as security for such bond or to indemnify any surety thereon, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

III.

The Date of the Opinion.

The date of the opinion of the Supreme Court of Oklahoma which is the highest court to which the case could have been carried was January 10, 1939. Petition for Rehearing was timely filed and denied on April 4, 1939. Application for Permission to File Second Petition for Rehearing was filed and denied on May 16, 1939.

IV.

Date of Application for Appeal to the Supreme Court of the United States.

The Petition for Appeal to the Supreme Court of the United States was presented to and allowed by the Chief

Justice of the Supreme Court of Oklahoma on the 30th day of June, 1939.

V

Nature of Case, Including a Statement of the Grounds Upon Which it is Contended that the Questions Involved are Substantial.

This is an appeal from the final judgment of the Supreme Court of Oklahoma in cause No. 27,931, Pauline Oil & Gas Company, plaintiff, in error, vs. Abe Fischer, defendant in error, which was an appeal from the judgment entered in favor of Fischer for possession, quieting title to a certain oil and gas lease, and damages, tried in the District Court of Pawnee County, Oklahoma. The facts are undisputed and may briefly be stated as follows:

In August, 1934, Sam Rainbolt obtained an award for compensation from the Geraldine Oil Company before the Industrial Commission of the State of Oklahoma. In October, 1934, the Geraldine Oil Company purported to make an assignment of all of its assets, including the lease in question, for benefit of creditors. In January, 1935, sale was made by the aforesaid assignee for benefit of creditors to the Pauline Oil & Gas Company for the sum of \$2500.00. In September, 1935, Sam Rainbolt, contending that the alleged assignment for benefit of creditors and the proceedings thereunder were fraudulent and void, issued an execution against the assets and property of the Geraldine Oil Company, and the Sheriff of Pawnee County on September 17, 1935, levied upon the lease in question and advertised the same for sale for November 12, 1935. On November 12, 1935, the property was sold by the Sheriff pursuant to the execution and levy aforesaid to Abe Fischer, the appellant. On October 24, 1935, some few days before the sheriff's sale as above set out, the Geraldine Oil Company, upon its vol-

untary petition, was adjudged bankrupt in the United States District Court. On motion to confirm the sheriff's sale in the District Court of Pawnee County H. E. Beese, who meanwhile had been appointed trustee in bankruptcy, appeared and objected to the confirmation of sale, as did Fischer, the purchaser thereat. Said objections were overruled and the sale was confirmed. H. E. Beese, the trustee in bankruptcy, did not at any time go into possession of the lease in question nor did he attempt to administer it as any part of the bankrupt estate. The petition in bankruptcy had listed the lease in the alternative, listing it in its schedule of real estate and personal property as being part of the assets of the bankrupt. Also therein, however, the petition alleged that the property had been assigned for benefit of creditors and that the property had been sold by the assignee for benefit of creditors to the Pauline Oil & Gas Company for the sum of \$2,000.00, and stated that the assignee for benefit of creditors was willing and ready to pay to the trustee in bankruptcy the said \$2,000.00. At no time did he exercise any jurisdiction over the property or attempt to possess himself of it in any way.

On the 4th day of June, 1936, the referee in bankruptcy without notice to Abe Fischer upon the application of the Pauline Oil & Gas Company in a summary proceeding purported to confirm the assignment made by the assignee for benefit of creditors to the Pauline Oil & Gas Company which had been made in January, 1935, or almost a year prior to the bankruptcy.

Thereafter in August, 1936, Abe Fischer commenced his suit in the District Court of Pawnee County against the Pauline Oil & Gas Company in ejectment and to quiet title to the lease involved and for damages for wrongful detention, basing his right upon the sheriff's deed which he had obtained. The Pauline Oil & Gas Company by its answer alleged that the sheriff's deed was void because of the bank-

ruptcy proceedings and alleged that it had title because of the sale to it from the assignee for benefit of creditors and the order of the referee in bankruptcy confirming said sale. Fischer by reply set up that Rainbolt had a statutory lien on the premises even prior to the assignment for benefit of creditors, that the assignment for benefit of creditors and the proceedings thereunder were fraught with fraud and that the bankruptcy proceedings and the orders entered therein did not destroy his title under the sheriff's sale. Upon trial of the issues so made up the trial court directed a verdict in favor of Fischer, holding that Sam Rainbolt had a statutory lien which prevailed over the assignment for benefit of creditors proceedings and the bankruptcy proceedings. On appeal the Supreme Court of Oklahoma held that Rainbolt did not have such a lien and that under the provision of Sec. 67f of the Bankruptcy Act the adjudication of bankruptcy voided the levy and lien of the Rainbolt execution, and that Fischer, the purchaser at said execution sale, acquired no title or interest upon which to predicate his suit or claim of fraud which would vitiate the title of the Pauline Oil & Gas Company.

So far as the questions brought to this Court are concerned, our contention in the appellate court was that Sec. 67f of the Bankruptcy Act did not operate to make void the lien of levy of Sam Rainbolt even though acquired within four months of the adjudication of bankruptcy because at and subsequent to the time the petition in bankruptcy was filed, the lease was neither in the actual nor constructive possession of the Geraldine Oil Company and was not in the actual or constructive possession of the trustee in bankruptcy; that the trustee in bankruptcy at no time had this lease in his possession nor did he attempt to obtain possession thereof but he in fact and in substance disclaimed title in and to this lease by electing to take the proceeds from the assignee for the benefit of creditors' sale to the Pauline Oil

& Gas Company; and that the order of the referee in bankruptcy purporting to confirm the sale made by the assignee for benefit of creditors to the Pauline Oil & Gas Company was without force and void to bind Fischer, who was not a party thereto because it was made in a summary proceedings without notice to Abe Fischer and the property was neither in the actual nor constructive possession of the trustee.

The Federal Questions Are Substantial.

The foregoing statement shows that the Federal question which was raised and determined is substantial. The opinion of the Supreme Court of Oklahoma in effect holds that a property which is in the hands of third persons, the title to which was being attacked by reason of fraud perpetrated by a debtor (as in this case the Geraldine Oil Company) is not subject to judicial determination when the debtor thereafter goes into bankruptcy even though the trustee in bankruptcy disclaims any interest in the property. In substance the determination if permitted to stand is to the effect that a bankruptcy proceedings wipes out a lien which a creditor has or claims against a property, although said property is not in the actual or constructive possession of the trustee in bankruptcy and the trustee in bankruptcy disclaims any interest therein.

The apparent title to this property was not in the bankrupt and had not been in the bankrupt for more than four months prior to the filing of petition in bankruptcy. The possession of the property involved in this suit was not in the bankrupt and had not been in the bankrupt for more than four months prior to the filing of petition in bankruptcy. The trustee for the bankrupt in substance disclaimed any right, title or interest therein, yet the Supreme Court of Oklahoma by its holding has held that the title of

a stranger to the bankruptcy proceedings in and to the property was adjudicated in and by the bankruptcy proceedings. Such a determination has never been made by this court, and such a holding is probably not in accord with the applicable decisions of this court. The questions involved are substantial and of general importance to those affected by the enforcement of the Bankruptcy Act in this Court.

This determination is not in harmony with *Connell v. Walker*, 291 U. S. 1, 78 Law Ed. 613; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 68 Law Ed. 770; *Remington on Bankruptcy*, Sec. 1876, page 703; *Hutchins v. Cantu*, Texas Civil Appeals, 66 S. W. 138, 8 C. J. S. 904, 910, 972, 6 Am. Jur. 698; *Pigg & Son v. U. S.*, 81 F. (2d) 334; *Miller v. Equitable Credit Company*, Ga., 138 S. E. 282; *Equitable Credit Company v. Miller*, Ga., 137 S. E. 771; *McKenney v. Cheney*, Ga., 45 S. E. 433; *Frazee v. Nelson*, Mass., 61 N. E. 40; *Martin v. Greenlake State Bank*, Minn., 208 N. W. 21; *Dickens v. Breedlove*, Ga., 129 S. E. 886; *Casady & Co. v. Hartzell*, Iowa, 151 N. W. 97; *Coker v. Utter*, Ga., 108 S. E. 538; *Neugent Garment Company v. U. S. F. & G.*, Wisc., 231 N. W. 600; *Walker v. Connell*, No. Dak., 249 N. W. 726 (appealed cause *Connell v. Walker*, *supra*, 291 U. S. 1); *Kobrin v. Drazin*, N. J., 128 Atl. 796; *McCarty v. Light*, 139 N. Y. S. 853.

VI.

How Federal Questions Were Raised in the First Instance in the Appellate Court and the Way in Which They Were Passed Upon by the Same Court.

The Federal question that was urged was first raised in the answer, and cross-petition filed by Pauline Oil & Gas Company, C. M. pp. 12-18, in the trial court, and in the reply, C. M. pp. 37-41, 50, thereto filed by Fischer and was

properly raised in the appellate court. This is shown by the following quotation from the opinion of the Supreme Court:

"Then it would follow that no lien attached until execution was issued and levied on this property. That occurred in September, 1935. But the former owner and execution debtor became a bankrupt in October, 1935, and the lien by levy was nullified by the provision of the Bankruptcy Act above cited. The effect of that Act is succinctly stated in Remington on Bankruptcy, Vol. 4, p. 682, sec. 1957, as follows:

'All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy.'

The former owner of this property was insolvent, and had been since October, 1934, when the assignment for creditors was made, and was in due course adjudged a bankrupt. Then the sheriff's sale subsequently made conveyed no title to plaintiff, and he had no title and had no right to prevail in the trial court.

This is true, even if defendant did not acquire any title to the property by purchase from the Trustee in January, 1935. It is therefore not necessary that we determine the validity of that trustee sale to pass title."

On petition for rehearing filed by Fischer the question was again raised by paragraphs numbered Second, Third and Fifth thereof (which see).

Fischer again raised the question on his application for permission to file second petition for rehearing (which see).

The general rule as stated in the opinion that levies obtained within four months of the adjudication of bankruptcy are void we do not complain of. We do complain that this rule was applied to the facts and circumstances of this case,

which facts are well reflected by the opinion as written. It is undisputed that the title and possession to this property had passed from the Geraldine Oil Company more than four months prior to the time it filed its voluntary petition and was adjudicated a bankrupt, that the trustee at no time administered any of this property, that the trustee at no time had either actual or constructive possession of this property, and although these facts which bring this case within the exceptions to the rule that levies are voided were repeatedly urged upon the Supreme Court, they were by that court disregarded by the opinion as written. It is the application of this rule of law to these undisputed facts which are reflected in the opinion which we contend constitutes a misinterpretation of Sec. 67f of the Bankruptcy Act and operates to deprive the appellant of a substantial property right.

VII.

Copy of the Opinion is Attached.

There is appended hereto a copy of the opinion of the Supreme Court of the State of Oklahoma. Such opinion is reported in — Pac. (2d) —.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
HUNT & EAGLETON,
HORACE BALLAINE,
Attorneys for Appellant.

EXHIBIT "A".

Mandate. D. C. 8989.

STATE OF OKLAHOMA,
 Supreme Court, ss:

No. 27931.

PAULINE OIL & GAS Co., Plaintiff in Error,

vs.

ABE FISCHER, Defendant in Error.

The Supreme Court of Oklahoma:

To the Honorable Judge of the District Court of Pawnee County, in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 10th day of January, 1939, render an opinion in the above entitled cause, appealed from the District Court of Pawnee County,

Reversing the judgment of the trial court.

Now, Therefore, you are hereby commanded to cause such reversal to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Costs paid into this court, \$25.00.

Witness, the Honorable Wayne W. Bayless, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 16th day of May.

ANDY PAYNE,

Clerk.

By CHRISTINE RATLIFF,

Deputy.

(SEAL.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 27931.

PAULINE OIL & GAS Co., Plaintiff in Error,

vs.

ABE FISCHER, Defendant in Error.

Syllabus

1. When an Industrial Commission award in favor of an injured workman remains unpaid, and a lien is claimed pursuant to section 13373 O. S. 1931, 85 Okl. St. Ann. sec. 49; and to enforce payment, the award is entered on the judgment docket of the District Court pursuant to section 13366, O. S. 1931, 85 Okl. St. Ann. Sec. 42, the award then "shall have the same force and be subject to the same law as judgments of the District Court," and thereby a lien, equivalent to a judgment lien, is impressed upon all of the property of the judgment debtor which would be subject to the lien of an original district court judgment, but property of the judgment debtor which would not be subject to judgment lien upon an original district court judgment, is not affected by such filing and entering of record of such award.

2. While an oil and gas lease which "grants, leases, and lets" certain land for oil and gas mining purposes, conveys to the lessee an estate in the realty described therein, such interest is not real estate within the meaning of section 690, C. O. S. 1921, which gives a judgment creditor a lien upon the "real estate" belonging to the judgment debtor.

3. A lien upon property obtained by issuance and levy of execution out of the state court, in less than four months preceding the filing in federal court of a bankruptcy petition by the judgment debtor who is insolvent, is nullified by the adjudication of bankruptcy, and a subsequent sheriff's sale on such execution passes no title to the purchaser.

4. A plaintiff seeking to quiet title and recover an oil and gas leasehold estate in lands, and certain materials, machinery, tools and appliances thereon, must recover, if at all, on the strength of his own title; and if his title is

based on purchase at sheriff's sale on execution nullified by the intervening bankruptcy of the judgment debtor, then such plaintiff has no title and cannot recover.

Appeal from the District Court of Pawnee County. Hon. Thurman S. Hurst, Judge.

Action by Abe Fischer against Pauline Oil Company, a corporation, Judgment for Plaintiff, and defendant appeals.

Reversed.

T. G. Chambers and James R. Eagleton, For Plaintiff in Error.

Hunt & Eagleton, Horace D. Ballaine, For Defendant in Error.

WELCH, V. C., J.

Abe Fischer, defendant in error, hereinafter referred to as plaintiff, commenced this action in the District Court of Pawnee County against the Pauline Oil & Gas Company, a corporation, plaintiff in error, hereinafter referred to as defendant; to quiet title to an oil and gas lease, to recover materials, machinery, tools and appliances thereon, and possession of the premises covered by the lease, and for damages. Judgment was for the plaintiff and defendant brings appeal.

The plaintiff's claim of title is based upon a conveyance from the sheriff following a sale under execution growing out of an award of the Industrial Commission against the Geraldine Oil Company. The defendant's claim of title is based upon a conveyance from a trustee for the benefit of creditors, following an assignment to said trustee by the Geraldine Oil Company.

On August 30, 1934, the Industrial Commission granted an award to Sam Rainbolt against J. W. Snyder, employer, and the Geraldine Oil Company, the owner of the property involved, which company was secondarily liable for the award. On October 11, 1934, the Geraldine Oil Company made an assignment of the property to a trustee for the benefit of creditors.

On December 8, 1934, the award of the Industrial Commission in favor of Sam Rainbolt was filed of record in the district Court of Pawnee County.

On January 21, 1935, sale was made by the aforesaid trustee of the property involved herein to the defendant.

On September 13, 1935, execution was issued on the judgment in favor of Sam Rainbolt by virtue of the award obtained in the Industrial Commission, said execution out of the district court being directed to the properties of the Geraldine Oil Company; and on September 17, 1935, levy was made under said execution on the property involved herein.

On October 24, 1935, upon its voluntary petition, the Geraldine Oil Company was adjudged bankrupt in the United States District Court.

On November 12, 1935, sheriff's sale was made of the property involved, pursuant to the execution and levy aforementioned; and following confirmation of said sale on June 10, 1936, sheriff's deed was issued to the purchaser, the plaintiff herein. On June 4, 1936, the United States District Court approved and confirmed the sale of said property made by the trustee for the benefit of creditors to the defendant on January 21, 1935.

Upon the pleadings, and after the introduction of all the evidence, the trial court directed a verdict for the plaintiff and assigned as his reason therefor that the judgment of the Industrial Commission constituted a lien upon all the property of the Geraldine Oil Company and that said lien was not destroyed by either the assignment for the benefit of creditors nor by the subsequent bankruptcy proceedings.

Since the right of plaintiff to recover depends on the strength of his own title, and since his title is assailed, we should first test the validity thereof.

It is plaintiff's theory that by purchase at the sheriff's sale he obtained title superior to the title of the former purchaser at the trustee's sale, and that although the levy on the property, as on execution, was in less than four months of bankruptcy, and the sheriff's sale was some weeks after bankruptcy, that his title was unaffected thereby. This theory is founded upon plaintiff's contention that lien in favor of the judgment creditor existed prior to the assignment for the benefit of creditors, and that such lien continued in full force until the sheriff's sale and confirmation

of sale, and that such lien was unaffected by anything that intervened. If that theory is sound the plaintiff rightfully recovered.

Upon the other hand, it is contended against plaintiff's title that no lien in favor of the judgment creditor had attached in October 1934, when the property assignment for the benefit of creditors was made, nor even in January 1935, when the trustee for creditors sold the property to the defendant. It is also asserted against plaintiff's title that since the sheriff's execution levy on the property was made in less than four months of bankruptcy, that the same was void by virtue of section 67, subdivision F of the bankruptcy act of 1898, as amended June 27, 1934, which in material part provides as follows:

"That all levies . . . or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, . . . shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy . . . shall be deemed wholly discharged and released from the same. . . ."

And if either of those contentions or theories is correct the plaintiff cannot prevail.

The Federal court in approving the sale theretofore made to the defendant by the trustee for creditors, seems to have proceeded upon the theory that the filing of the judgment for record in the District Court of Pawnee County did not create a lien on the property involved, and that no such lien existed since the judgment creditor had not up to the time of such sale, followed the recording of the judgment with the issuing of any execution.

It is to be noted that although the judgment creditor filed his judgment for record in the district court of Pawnee County in December 1934, he did not follow with execution until nine months later, in September, while bankruptcy intervened the following October. And in the meantime, in January, the trustee for creditors had sold the property pur-

suant to assignment theretofore made the preceding October.

The authority of such a judgment creditor to proceed by recording judgment and issuing execution is found in section 13366, O. S. 1931, 85 Okl. St. Ann. Sec. 42, which reads in part as follows:

"If payment of compensation or an installment thereof due under the terms of an award, except in case of appeals from an award, be not made within ten days after the same is due by the employer or insurance carrier liable therefor, the Commission may order a certified copy of the award to be filed in the office of the Court Clerk of any county, which award whether accumulative or lump sum shall be entered on the judgment docket of the district court, and shall have the same force and be subject to the same law as judgments of the District Court. Upon the filing of such certified copy of the Commission's award a writ of execution shall issue and such process shall be executed and the cost thereof taxed, as in the case of writs of execution, on judgments of courts of record, as provided by the code of civil procedure. • • •"

It seems clear from the language of the Act that the force and effect of such a judgment so filed and recorded is the same, as respects the questions here involved, as the rendering and recording of a district court judgment.

In *First National Bank of Healdton v. Dunlap*, 122 Okla. 288, 254 Pac. 729, this court held that the rendering and recording of a district court judgment did not create a lien upon an oil and gas lease, and the sale of same by the judgment debtor before issuance and levy of execution, passed title clear of any lien.

To be consistent with that authority we must hold that the judgment creditor here obtained no lien on this property merely by the filing of his judgment for record in the office of the court clerk.

Then it would follow that no lien attached until execution was issued and levied on this property. That occurred in September, 1935: But the former owner and execution

debtor became a bankrupt in October 1935, and the lien by levy was nullified by the provision of the Bankruptcy Act above cited. The effect of that Act is succinctly stated in Remington on Bankruptcy, Vol. 4, p. 682, sec. 1857, as follows:

"All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy."

The former owner of this property was insolvent, and had been since October 1934, when the assignment for creditors was made, and was in due course adjudged a bankrupt. Then the sheriff's sale subsequently made conveyed no title to plaintiff, and he had no title and had no right to prevail in the trial court.

This is true, even if defendant did not acquire any title to the property by purchase from the Trustee in January 1935. It is therefore not necessary that we determine the validity of that trustee sale to pass title.

The plaintiff also relies upon section 13373, O. S. 1931, 85 Okl. St. Ann. Sec. 49, which is as follows:

"The right of compensation granted by this act, and any claim for unpaid compensation insurance premium shall have the same preference or lien, without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor."

Plaintiff asserts that thereby the lien of the judgment creditor attached from the time Rainbolt commenced proceedings to collect his award by filing his judgment for record in the district court.

It is to be noted here that Snyder, and not the Geraldine Oil Company, was the "employer" of Rainbolt. That company was only secondarily liable to Rainbolt and such secondary liability could be enforced only after exhausting execution on the primary liability. (Sec. 13351, O. S. 1931, 85 Okl. St. Ann. Sec. 11). Assuming, but not deciding, that

the Geraldine Oil Company would be included in the designation "employer" in section 13373, *supra*, still this contention of plaintiff cannot be sustained.

Section 13373, *supra*, purports to grant a lien the same as a lien "for wages for labor." That latter lien is provided for in Section 11007, O. S. 1931, 42 Okl. St. Ann. Sec. 92, and is enforceable in the specific manner provided by the next following sections. Enforcement of such lien by laborers in the manner specified is essential to preserve the right to such lien, *McGuire v. Duncan*, 100 Okla. 217, 229 Pac. 199, and that rule likewise applies to claimants for unpaid compensation insurance premiums, who assert a lien under Section 13373, *supra*, *Pacific Petroleum Co. v. Sunbeam Oil Co.*, 176 Okla. 293, 54 Pac. (2d) 1054. It would therefore seem that Section 11007, *supra*, and Section 13373, *supra*, are not self executing but must be read in connection with the methods provided for enforcement of the liens therein mentioned.

The judgment creditor here proceeded to enforce his lien or his right to collect from the Geraldine Oil Company by filing his award or judgment in the District Court pursuant to Section 13366, *supra*. While the plaintiff contends the lien mentioned in Section 13373, *supra*, attached to all property from such filing of the judgment, we are convinced that the effect of such filing of the judgment is tested by the provisions of the Section (13366, *supra*) which authorizes such procedure. There it is provided that such a judgment or award so filed and entered upon the district court records "shall have the same force and be subject to the same law as judgments of the district court." This contention of plaintiff would accept all of the benefits of filing an award in the district court to obtain for it the status of a district court judgment, but would avoid the fixed limitations of such a status.

When this award was filed and entered on the judgment docket of the district court and thereby gained the status of a district court judgment, and had "the same force" and was "subject to the same law as judgments of the district court"; it thereby impressed a lien on all property upon which a district court judgment would impress a lien, and as to property upon which a district court judgment would

not impress a lien, such filing of this award likewise would not impress a lien. We think no other logical result can be reached from the language of the statutes. Therefore this contention of the plaintiff cannot be sustained.

There is some language in plaintiff's brief indicating a contention, in substance, that a lien in favor of Rainbolt for compensation mentioned in Section 13373, *supra*, attached to all of the property of the Geraldine Oil Company from the time Rainbolt commenced proceedings to enforce his right of compensation under the Workmen's Compensation Act. That contention could not be sound for the reasons heretofore stated, and because no such provision or legislative intent can be found from the statutes. If that position could be sound, then any purchaser of an item of real or personal property, however insignificant, would be under the burden of ascertaining whether his vendor was the employer of labor, or might be liable primarily or secondarily on any workmen's compensation claim in any manner pending before the Industrial Commission.

We conclude that the claimant, Rainbolt, obtained no lien on the property here involved by the commencement of his proceedings before the Industrial Commission to enforce his right of compensation; nor by the filing and entering of the award in the records of the district court; and that whatever lien he obtained by levy of execution was obtained within four months of bankruptcy of the judgment debtor, and was therefore nullified by the bankruptcy act, and that the subsequent sheriff's sale on that execution conveyed no title to the plaintiff.

It follows that the plaintiff had no title and no right to recover, and the trial court erred in rendering judgment for the plaintiff.

That judgment is reversed, and the cause remanded, with directions to enter judgment denying the plaintiff any relief.

Bayless, C. J. Riley, Osborn, Corn, Gibson, Davison and Danner, JJ. Concur. Hurst, J. Not Participating.

I, Andy Payne, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion of said Court

in the above entitled cause, as the same remains on file in my office.

In Witness Whereof, I hereunto set my hand and affix the said Court, at Oklahoma City, this the 16th day of May, 1939.

ANDY PAYNE,

[SEAL.]

Clerk.

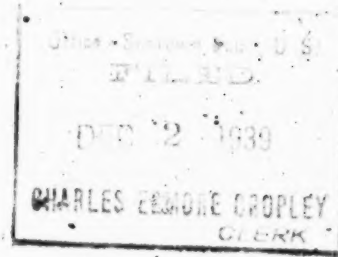
By CHRISTINE RATLIFF.

Filed in Supreme Court of Oklahoma, Jan. 10, 1939.
Andy Payne, Clerk.

Filed in the District Court, Pawnee County, Oklahoma,
May 17, 1939. Nora B. Harshbarger, Court Clerk. By
Ethel Traver, Deputy.

(2862)

FILE COPY



No. 239

In the Supreme Court of the United States

October Term, 1939.

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY.

BRIEF OF PETITIONER.

✓ **CLAUDE H. ROSENSTEIN,**
Counsel for Petitioner.

**HUNT & EAGLETON,
HORACE D. BALLAJNE,**
Of Counsel.

INDEX.

	PAGE
Reference to official report of opinion delivered in the court below	1
Statement of the ground on which the jurisdiction of the Supreme Court of the United States is involved.	1
Statement of the case	3
Assignments of error	7
Argument	9
Property fraudulently conveyed to an assignee for benefit of creditors is subject to attachment as the property of the debtor	10
The right given to a creditor by state law to have a fraudulent conveyance set aside is withdrawn from him by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of the creditors	10
Only the trustee in bankruptcy, and not the debtor or a prior purchaser of the property involved, may assert the voidance of a proceedings or the discharge of a lien under the provisions of Sec. 67f of the Bankruptcy Act	11
Orders made in subsidiary proceedings in bankruptcy are not <i>res adjudicata</i> on persons not party thereto	13
Conclusion	13

TABLE OF CASES.

Coker v. Utter, (Ga.) 108 S. E. 538	12
Connell v. Walker, 291 U. S. 1, 78 L. ed. 613	11, 12
Dickens v. Breedlove, (Ga.) 129 S. E. 886	12
First State Bank of Dawson v. Bradshaw, 174 Okl. 268, 51 P. (2d) 514	10
Equitable Credit Co. v. Miller, (Ga.) 137 S. E. 771	12
Frazee v. Nelson, (Mass.) 61 N. E. 40	12

TABLE OF CASES—CONTINUED.

PAGE

Gratiot County State Bank v. Johnson, 249 U. S. 246, 63 L. ed. 247	13
Hutchins v. Cantu, (Tex. Civ. App.) 66 S. W. 138.....	12
Jones v. Springer, 226 U. S. 148, 57 L. ed. 161.....	11
Kobrin v. Drazin, (N. J.) 128 Atl. 796.....	12
Martin v. Greenlake State Bank, (Minn.) 208 N. W. 21..	12
McKenney v. Cheney, (Ga.) 45 S. E. 433.....	12
Miller v. Equitable Credit Co., (Ga.) 138 S. E. 282....	12
Neugent Garment Co. v. U. S. F. & G., (Wis.) 231 N. W. 600.....	12
Pauline Oil & Gas Co. v. Fischer, 90 P. (2d) 411.....	1
Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128.....	11
Pigg & Son v. United States, (C. C. 10th) 81 F. (2d) 334.	12
Straton v. New, 283 U. S. 318, 75 L. ed. 1060.....	11
Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.....	11, 12, 13
Walker v. Connell, (N. Dak.) 249 N. W. 726.....	12
Wells v. Guaranty State Bank, 56 Okl. 688, 156 Pac. 896	10

TEXT BOOKS.

6 Am. Jur. 698	31
8 C. J. S. 910	13

STATUTES.

Bankruptcy Act, Sec. 67f (11 U. S. C. A., Sec. 107, as amended)	1, 2
Judicial Code, Sec. 237, as amended (U. S. C. A., title 28, Sec. 344)	2
30 Stat. 564, c. 541, Sec. 67	1
32 Stat. 800, c. 487, Sec. 16	1
36 Stat. 842, c. 412, Sec. 12	1
48 Stat. 924, c. 424, Sec. 5	1

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1939.

No. 239

ABE FISCHER, Petitioner,

vs.

PAULINE OIL & GAS COMPANY.

BRIEF of PETITIONER.

**Reference to Official Report of Opinion Delivered in the
Court Below.**

This cause has not yet been officially reported but appears as *Pauline Oil & Gas Co. v. Fischer*, 90 P. (2d) 411.

**Statement of the Ground on Which the Jurisdiction of the
Supreme Court of the United States Is Involved.**

The Supreme Court of Oklahoma determined this cause adversely to the rights of Abe Fischer by its interpretation of section 67f of the Bankruptcy Act (chapter 541, section 67, 30 Stat. 564; as amended chapter 487, section 16, 32 Stat. 800; chapter 412, section 12, 36 Stat. 842; chapter 424, section 5, 48 Stat. 924) (U. S. C. A., title 11, section 107 as amended). Petitioner contends that the Supreme Court of Oklahoma misinterpreted this statute, and by this misinterpretation of the federal statute which was in effect prior to January 31, 1938, was deprived of his title to a certain oil and gas lease.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States are subdivisions b and c of section 237 of the Judicial Code as amended (U. S. C. A., title 28, section 344), the pertinent provision of which is:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States * * *."

The basic federal statute involved is section 67f of the Bankruptcy Act as amended. It reads as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, and any bond which may be given to dissolve any such lien so created, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, and any non-exempt property of his which he shall have deposited or pledged as security for such bond or to indemnify any surety thereon, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect:

Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Petition for appeal to the Supreme Court of the United States was presented to and allowed by the Chief Justice of the Supreme Court of Oklahoma on the 30th day of June, 1939. This court on October 9, 1939, dismissed the appeal but granted *certiorari* under the provisions of section 237c, Judicial Code as amended (43 Stat. 936, 938).

Statement of the Case.

The facts of this case so far as are pertinent here are simple and undisputed. The Supreme Court of Oklahoma by its interpretation of the provisions of section 67f of the Bankruptcy Act determined that Abe Fischer had been by the bankruptcy proceedings of the Geraldine Oil Company foreclosed of any right which would permit him to attack the purported title of the Pauline Oil & Gas Company to the oil and gas lease involved.

In August, 1934, Sam Rainbolt obtained an award for compensation from the Geraldine Oil Company before the Industrial Commission of the State of Oklahoma. In October, 1934, the Geraldine Oil Company made an assignment of assets, including the lease in question, for benefit of creditors. In January, 1935, sale was made by the assignee for benefit of creditors to the Pauline Oil & Gas Company for the sum of \$2500.00. In September, 1935, Sam Rainbolt, contending that the alleged assignment for benefit of creditors and the proceedings thereunder were fraudulent and void, issued an execution against the assets and property of the Geraldine Oil Company, and the Sheriff of Pawnee County on September 17, 1935, levied upon the lease in question

and advertised the same for sale for November 12, 1935. On November 12, 1935, the property was sold by the sheriff pursuant to the execution and levy aforesaid to Abe Fischer, the petitioner. On October 24, 1935, some few days before the sheriff's sale as above set out, the Geraldine Oil Company, upon its voluntary petition, was adjudged bankrupt in the United States District Court.

On the 4th day of June, 1936, the referee in bankruptcy upon the application of the Pauline Oil & Gas Company in a summary proceeding purported to confirm the assignment made by the assignee for benefit of creditors to the Pauline Oil & Gas Company which had been made in January, 1935.

Thereafter in August, 1936, Abe Fischer commenced his suit in the District Court of Pawnee County against the Pauline Oil & Gas Company in ejectment and to quiet title to the lease involved and for damages for wrongful detention, basing his right upon the sheriff's deed which he had obtained. The Pauline Oil & Gas Company by its answer alleged that the sheriff's deed was void because of the bankruptcy proceedings and alleged that it had title because of the sale to it from the assignee for benefit of creditors and the order of the referee in bankruptcy confirming said sale. Fischer by reply set up that Rainbolt had a statutory lien on the premises even prior to the assignment for benefit of creditors, that the assignment for benefit of creditors and the proceedings thereunder were fraught with fraud and that the bankruptcy proceedings and the orders entered therein did not destroy his title under the sheriff's sale. Upon trial of the issues so made up the trial court directed a verdict in favor of Fischer, holding that Sam Rainbolt had a statutory lien which prevailed over the assignment for benefit of creditors' proceedings and the bankruptcy proceedings. On appeal the Supreme Court of Oklahoma held that Rainbolt did not have such a lien and that under the

provision of section 67f of the Bankruptcy Act the adjudication of bankruptcy voided the levy and lien of the Rainbolt execution, and that Fischer, the purchaser at said execution sale, acquired no title or interest upon which to predicate his suit or claim of fraud which would vitiate the title of the Pauline Oil & Gas Company.

That court in the opinion applied section 67f of the Bankruptcy Act and held that Fischer had no interest in the oil and gas lease in the following language:

"Then it would follow that no lien attached until execution was issued and levied on this property. That occurred in September, 1935. But the former owner and execution debtor became a bankrupt in October, 1935, and the lien by levy was nullified by the provision of the Bankruptcy Act above cited. The effect of that act is succinctly stated in Remington on Bankruptcy, Vol. 4, p. 682, Sec. 1957, as follows:

'All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy.'

"The former owner of this property was insolvent, and had been since October, 1934, when the assignment for creditors was made, and was in due course adjudged a bankrupt. Then the sheriff's sale subsequently made conveyed no title to plaintiff, and he had no title and had no right to prevail in the trial court.

"This is true, even if defendant did not acquire any title to the property by purchase from the trustee in January, 1935. It is therefore not necessary that we determine the validity of that trustee sale to pass title."

So far as the questions brought to this Court are concerned, our contention in the appellate court was that section 67f of the Bankruptcy Act did not operate to make void the lien of levy of Sam Rainbolt even though acquired

within four months of the adjudication of bankruptcy because at and subsequent to the time the petition in bankruptcy was filed, the lease was neither in the actual nor constructive possession of the Geraldine Oil Company and was not in the actual or constructive possession of the trustee in bankruptcy; that the trustee in bankruptcy at no time had this lease in his possession nor did he attempt to obtain possession thereof but he in fact and in substance disclaimed title in and to this lease by electing to take the proceeds from the assignee for the benefit of creditors' sale to the Pauline Oil & Gas Company; and that the order of the referee in bankruptcy purporting to confirm the sale made by the assignee for benefit of creditors to the Pauline Oil & Gas Company was without force and void to bind Fischer, who was not a party thereto because it was made in a summary proceedings without notice to Abe Fischer and the property was neither in the actual nor constructive possession of the trustee.

(Petition and Exhibits, R. 2-7; Answer and Cross Petition and Exhibits, R. 8-17; Reply to Answer and Answer to Cross Petition, R. 17-20; Amendment to Answer and Answer to Cross Petition, R. 20; Opinion of the Supreme Court of Oklahoma, R. 37-44.)

ASSIGNMENTS of ERROR.

The following assignments of error were made by petitioner when his petition for appeal was filed and will be urged in this court:

1. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) voids a levy obtained within four months of bankruptcy on a piece of property under a general execution issued against the judgment debtor when: *a*, The title of the property is held by a third person; *b*, the property at the time of the levy was not in the possession of the bankrupt; *c*, the property levied upon is neither actually nor constructively in the possession of the bankrupt or the trustee in bankruptcy.

2. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) avoids a levy obtained within four months of bankruptcy upon a property under a general execution issued against the debtor, who later was adjudicated a bankrupt, when the property levied upon was neither actually nor constructively in the possession of the bankrupt.

3. The Supreme Court of Oklahoma erred in holding that under the provision of section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) the levy of a general execution issued against the Geraldine Oil Company on an oil and gas lease, title and possession of which was in the Pauline Oil & Gas Company, which company had purchased it from the assignee for benefit of creditors of the Geraldine Oil Company, was voided by the adjudication of bankruptcy against the Geraldine Oil Company within four months after the execution levy was made and thus fore-

closing Fischer, the purchaser at the sheriff's sale, from establishing, in a suit between Fischer and the Pauline Oil & Gas Company, the fraud inhering in the proceedings of the assignment for benefit of creditors and bankruptcy in support of his title to the said oil and gas lease.

4. The Supreme Court of Oklahoma erred in holding in effect that the referee in bankruptcy had jurisdiction in a summary proceeding to determine title to the property herein questioned when possession of the property was neither actually nor constructively in either the trustee in bankruptcy or the bankrupt.

5. The Supreme Court of Oklahoma erred in holding that section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) operated to avoid a lien of levy acquired within four months of the adjudication upon property which the trustee neither took possession of nor administered.

6. The Supreme Court of Oklahoma erred in holding that the Pauline Oil & Gas Company, which did not take title from or through the trustee in bankruptcy of the Geraldine Oil Company, could avail itself of the benefits of the provision of section 67f of the Bankruptcy Act (11 U. S. C. A., Sec. 107 as amended) and thus defend its purported title obtained long prior to the bankruptcy proceedings against Fischer who purchased the property at an execution sale, which execution was levied upon the oil and gas lease involved within four months of the adjudication of bankruptcy of the judgment debtor, the Geraldine Oil Company.

ARGUMENT.

The Supreme Court of Oklahoma by its interpretation and application of the provisions of the Bankruptcy Act denied Abe Fischer, petitioner his day in court. The petitioner, holding title through an execution sale, which execution was levied within four months of bankruptcy, attacked the adverse title thereto of the Pauline Oil & Gas Company. The trial court directed a verdict in petitioner's favor on the theory that his title came through the foreclosure of a statutory lien. The Supreme Court of Oklahoma determined that there was no statutory lien foreclosed and that the directed verdict was erroneous and refused to give consideration to any of the other theories and contentions of the plaintiff on the ground that the levy of execution made on this lease within four months of the filing of the bankruptcy proceedings was automatically voided by the bankruptcy proceedings and that the proceedings and sale thereunder gave the petitioner no title or interest in and to the property upon which he might rely to quiet title against the title and claim of the Pauline Oil & Gas Company, which petitioner claimed was founded upon assignment made in fraud of creditors.

We submit that the assignment for benefit of creditors, if void as being made in fraud of creditors, being subject to execution as the property of the debtor, Geraldine Oil Company, was brought into the jurisdiction of the District Court of Pawnee County, Oklahoma, by the levy of execution and that the jurisdiction of this District Court of Pawnee County, Oklahoma, was not automatically withdrawn but that said proceedings under the Bankruptcy Act could have been preserved for the benefit of the trustee in bankruptcy, which was not done; that in the absence of action on behalf of the trustee in bankruptcy and the bankruptcy

court to avail itself of the benefits of that proceedings for the benefit of creditors of the Geraldine Oil Company, the proceedings in that court and the title obtained by the purchaser at the sale under that proceedings are not affected by the bankruptcy proceedings; that the order made by the referee in bankruptcy which purported to ratify and approve the title of the Pauline Oil & Gas Company was ineffective to bind Abe Fischer, who was not a party to that proceedings.

Property fraudulently conveyed to an assignee for benefit of creditors is subject to attachment as the property of the debtor.

Under the law of Oklahoma property conveyed under assignment for benefit of creditors which is void as being in fraud of creditors is subject to attachment as the property of the debtor.

—*Wells v. Guaranty State Bank*, 56 Okl. 688, 156 Pac. 896;

**First State Bank of Dawson v. Bradshaw*, 174 Okl. 268, 51 P. (2d) 514.

*** The right given to a creditor by state law to have a fraudulent conveyance set aside is withdrawn from him by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of the creditors.**

In October, 1934, the Geraldine Oil Company made the assignment for the benefit of creditors. The assignee, trustee for the property, made sale thereof to the Pauline Oil & Gas Company January 21, 1935. On September 17, 1935, execution levy was made on this oil and gas lease on judgment against the Geraldine Oil Company. The Geraldine Oil Company was adjudicated a bankrupt on October 24, 1935. The right given to a creditor by the state law to have a fraudulent conveyance set aside is withdrawn from him

by the Bankruptcy Act only upon the election of the trustee in bankruptcy to assert the rights of a creditor. The authority given the trustee to stay a pending suit is not mandatory but permissive to be exercised in the sound discretion of the bankruptcy court.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613.

Bankruptcy proceedings do not merely by virtue of their maintenance terminate an action already pending in a non-bankruptcy court to which the bankrupt is a party.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770;

Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128;

Jones v. Springer, 226 U. S. 148, 57 L. ed. 161;

Straton v. New, 283 U. S. 318, 75 L. ed. 1060.

Only the trustee in bankruptcy, and not the debtor or a prior purchaser of the property involved, may assert the avoidance of a proceedings or the discharge of a lien under the provisions of Sec. 67f of the Bankruptcy Act.

In this cause the oil and gas lease was conveyed to the assignee for benefit of creditors in October, 1934, and by him sold and conveyed to the Pauline Oil & Gas Company on January 21, 1935, and the Geraldine Oil Company was not brought into the bankruptcy court until October 24, 1935, more than four months thereafter. The bankruptcy proceedings did not vest the bankruptcy court with jurisdiction of the oil and gas lease involved here.

—*Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.

The provisions of section 67f of the Bankruptcy Act are for the benefit of the bankrupt's estate and the creditors of the bankrupt. The trustee in bankruptcy is the one who

assembles and preserves the property for the creditors of the bankrupt. He is the one who has the power under the direction of the bankruptcy court to recover property fraudulently assigned and conveyed by the bankrupt prior to bankruptcy. Only the trustee in bankruptcy and those in privity with him may assert the voidance of a proceedings or the discharge of a lien under the provisions of section 67f of the Bankruptcy Act. A sale of realty under execution issued less than four months prior to the time when the execution defendant was declared a bankrupt will not be avoided at the suit of a former grantee of the same property, only the trustee in bankruptcy being entitled to plead the nullity of the execution:

—*Hutchins v. Cantu*, (Texas Civil Appeals) 66 S. W. 138.

To the same general effect are:

Connell v. Walker, 291 U. S. 1, 78 L. ed. 613;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770;

Frazer v. Nelson, (Mass.) 61 N. E. 40;

Equitable Credit Co. v. Miller, (Ga.) 137 S. E. 771;

Miller v. Equitable Credit Co., (Ga.) 138 S. E. 282;

McKenney v. Cheney, (Ga.) 45 S. E. 433;

Martin v. Greenlake State Bank, (Minn.) 208 N. W. 21;

Dickens v. Breedlove, (Ga.) 129 S. E. 886;

Coker v. Utter, (Ga.) 108 S. E. 538;

Neugent Garment Co. v. U. S. F. & G., (Wis.) 231 N. W. 600;

Walker v. Connell, (N. Dak.) 249 N. W. 726 (this cause was appealed in turn to the Supreme Court of the United States in *Connell v. Walker*, 291 U. S. 1, 78 L. ed. 613);

Kobrin v. Drazin, (N. J.) 128 Atl. 796;

Pigg & Son v. United States, (C. C. 10th) 81 F. (2d) 334;

8 C. J. S. 910;
6 Am. Jur. 698.

Orders made in subsidiary proceedings in bankruptcy are not *res adjudicata* on persons not party thereto.

All the world is bound by the adjudication of bankruptcy, but strangers to the proceedings are unaffected by the decisions and orders of that court on subsidiary issues. Fischer was not a party to the bankruptcy proceedings so could not be bound, and his interest could not be adjudicated by the bankruptcy court making an order purporting to confirm the sale made by the assignee for benefit of creditors to the Geraldine Oil Company long prior to bankruptcy.

—*Gratiot County State Bank v. Johnson*, 249 U. S. 246, 63 L. ed. 247;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. ed. 770.

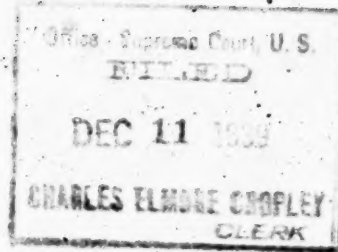
Conclusion.

We respectfully submit that the Supreme Court of Oklahoma made an erroneous interpretation and application of the provisions of Section 67f of the Bankruptcy Act and that that error should be corrected by this Court and that petitioner be granted his full day in court.

CLAUDE H. ROSENSTEIN,
Counsel for Petitioner.

HUNT & EAGLETON,
HORACE D. BALLAINE,
Of Counsel.

FILE COPY



No. 239

In the Supreme Court of the United States
October Term, 1939

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY, *Respondent.*

BRIEF OF RESPONDENT

✓ CHARLES E. FRANCE,
Oklahoma City, Oklahoma,
Counsel for Respondent.

T. G. CHAMBERS,
JAMES R. EAGLETON,
Oklahoma City, Oklahoma,
Of Counsel.

INDEX

	PAGE
Suggestions of Material Facts Omitted from Petitioner's Statement -----	1
Argument -----	3
Upon adjudication of bankruptcy and the appointment of trustee and assignee for the bankrupt's estate, a right of action, if any, to set aside an alleged fraudulent transfer and assignment for the benefit of creditors vests solely in the trustee and assignee. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor, or those claiming under him, to do so ----	5
If a claimant in possession of property adverse to the trustee submits himself and property to the jurisdiction of the bankruptcy court in summary proceedings, where otherwise such court would not have jurisdiction, the adjudication in such summary proceedings is final and binding upon the trustee and such claimant -----	8
Conclusion -----	9

TABLE OF CASES

Bardes vs. First. Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 S. Ct. 1000, 4 Am. Bankr. Rep. 163 -----	9
Benner vs. Scandinavian Am. Bank, 73 Wash. 488; 131 Pac. 1149 -----	7
Bryan vs. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 S. Ct. 557, 5 Am. Bankr. Rep. 623 -----	9
Bryant vs. Swofford Bros. Dry Goods Co., 214 U. S. 279, 53 L. ed. 997, 29 S. Ct. 614, 22 Am. Bankr. Rep. 111 -----	9
Glenny v. Langdon, 98 U. S. 20 -----	6
In Re Howard Laundry Co., 203 Fed. 445 -----	8
Moyer vs. Dewey, 103 U. S. 301 -----	6

INDEX (Continued)

PAGE

TABLE OF CASES—CONTINUED

Ruhl-Koblegård Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929, 22 Am. Bankr. Rep. 643; Annotation, 11 Ann. Cas. 932	7
Trimble v. Woodhead et al., 102 U. S. 647, 26 L. ed. 290	5, 6, 7
Wright et al. vs. H. B. Ehrlich & Co., (Ga.), 91 S. E. 412	6

TEXT BOOKS

Am. Jur., Vol. 6, P. 657, Sec. 243	6
Am. Jur., Vol. 6, P. 729, Sec. 338	8
11 Ann. Cas. 932, Note	6

STATUTES

Bankruptcy Act, Sec. 67f (11 U. S. C. A., Sec. 107, as amended)	5
Bankruptcy Act., Sec. 23b (11 U. S. C. A., Sec. 46b)	9

In the Supreme Court of the United States

October Term, 1939

No. 239

ABE FISCHER, *Petitioner,*

VS.

PAULINE OIL & GAS COMPANY, *Respondent.*

BRIEF OF RESPONDENT

Suggestions of Material Facts Omitted from Petitioner's Statement

In order to present properly the theory upon which the respondent has predicated its rights in this case, and also more fully to present the theory upon which the Supreme Court of Oklahoma has based its opinion, we wish to suggest that the transcript of record, although not including testimony to the effect that the Pauline Oil & Gas Company was at all times after January, 1935, when sale was made to it by the assignee for the benefit of creditors of the Geraldine Oil Company, in actual physical possession of the leased property involved herein, it does disclose from the petition of the petitioner, Abe Fischer, filed in the District Court of Pawnee County, Oklahoma, on August 4, 1936, an admission and allegation by the petitioner that this respondent at the

time of the institution of suit was in the actual physical possession of said leased property.

An examination of the transcript of record will further disclose that the petitioner has never alleged or proved any possession by himself or the sheriff making the levy in and to this property.

The insolvency of the Geraldine Oil Company from the time of the assignment for the benefit of creditors and at the time of the levy of execution cannot be and is not disputed.

The transcript of record will show that the petitioner never has alleged or proved any lack of notice to him of the adjudication of bankruptcy, had on October 24, 1935, at the time of his purchase at the sheriff's sale had on November 12, 1935, nor any allegation or proof on his part that he was an innocent purchaser for value, although, as a matter of fact, the original record discloses a stipulation upon the part of the petitioner of having had such notice.

Although the transcript of record does not include the petition of the Pauline Oil & Gas Company to the referee in bankruptcy submitting itself, the property, and the purchase price of \$2500 to the jurisdiction of the referee for the determination of its rights in and to said property, the transcript of record does present the order and judgment of the referee reciting such fact, and adjudicating the validity of the assignment for the benefit of creditors made by the Geraldine Oil Company in October, 1934, and the title acquired therein by the Pauline Oil & Gas Company under sale had in January, 1935.

An itemized statement of this property was also included in the schedule of the Geraldine Oil Company, bankrupt, to its voluntary petition of bankruptcy.

(Petition of Abe Fischer and Exhibits, R. 2-7; Order and Judgment of Referee in Bankruptcy, Exhibit E to Answer, R. 16-17; Schedule to Voluntary Petition in Bankruptcy of Geraldine Oil Company, R. 27-30.)

ARGUMENT

The respondent has called attention to the omissions made in petitioner's statement of the case to bring the Court's attention to the fact that in this case neither the judgment creditor, the sheriff making the levy, nor the petitioner, Abe Fischer, were ever in actual or constructive adverse possession of the property involved, because the same was at all times in the actual physical possession of the respondent. Nor does the petitioner rely upon any alleged solvency of the Geraldine Oil Company at the time of the levy. Nor does the petitioner contend that he was an innocent purchaser for value without notice of the bankruptcy.

Under these circumstances, the instant case can readily be distinguished from the authorities cited by petitioner in his brief wherein the property was held in the actual or constructive possession of an adverse claimant resisting the jurisdiction of the bankruptcy court, or where the party in actual or constructive possession of the property had not consented to and subjected himself and property to the jurisdiction of the bankruptcy court in summary proceedings.

Upon the adjudication of the bankruptcy of the Geraldine Oil Company on October 24, 1935, all rights of creditors to attack the validity of the sale by the assignee for the benefit of creditors to the respondent, Pauline Oil & Gas Company, in January, 1935, vested in the trustee in bankruptcy and in him solely. In other words, the right of Sam Rainbolt, judgment creditor, and those claiming under him, to attack the validity of such sale by the assignee for the benefit of creditors to the respondent vested solely in the trustee.

Even though the referee did not have jurisdiction to require the respondent to submit to summary proceedings to litigate its title and rights to said property, of which it was in possession, the respondent, Pauline Oil & Gas Company, did submit itself and this property to the jurisdiction of the referee in summary proceedings, and in such proceedings the referee adjudicated the rights as between the respondent, Pauline Oil & Gas Company, and the trustee representing all creditors and their rights. The respondent, being in actual physical possession of said property, having submitted itself and the property to the jurisdiction of the referee in such summary proceedings, placed the trustee in constructive possession of the property, and the determination by the referee became final and binding when not appealed from as to all creditors' rights to attack the validity of the title of the respondent, and the validity of the title of the respondent thereby became finally determined.

The Supreme Court of Oklahoma, being convinced of the foregoing, rightly determined that since the respondent's title had been so finally determined valid in such pro-

ceedings, the lien under which the petitioner was claiming was void as against the respondent, who was holding under the trustee through such adjudication, by virtue of Section 67f of the Bankruptcy Act (11 U. S. C. A., Section 107, as amended), since the petitioner was not alleging the solvency of the Geraldine Oil Company or that he was a purchaser for value without notice.

Under the authorities which we will present, however, after such a determination of the rights as between this respondent and all creditors, the petitioner, claiming under a creditor, would be estopped from again litigating in a separate action the title of this respondent or the question as to whether there was any fraud of creditors in the assignment for the benefit of creditors.

Upon adjudication of bankruptcy and the appointment of trustee and assignee for the bankrupt's estate, a right of action, if any, to set aside an alleged fraudulent transfer and assignment for the benefit of creditors vests solely in the trustee and assignee. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor, or those claiming under him, to do so.

In the case of *James S. Trimble vs. Joshua Woodhead et al.*, 102 U. S. 647, 26 L. ed. 290, the syllabus is as follows:

"1. Rights to property fraudulently transferred by a bankrupt, pass to his assignee in bankruptcy, and a creditor of the bankrupt cannot assert them in his own name.

"2. The failure of the assignee to sue within two years does not transfer his right of action to a creditor."

Also, in the case of *Wright et al. v. H. B. Ehrlich & Co.*, (Ga.), 91 S. E. 412, the syllabus by the court is as follows:

“Where one conveys his property to another under circumstances which render the conveyance void, and shortly thereafter is adjudicated a bankrupt, the right to have the property referred to brought to sale as a part of the assets of the bankrupt’s estate is in the trustee in bankruptcy; and individual creditors cannot maintain a suit to have the void conveyance canceled and the property brought to sale to satisfy their demands, without showing that they have moved in bankruptcy court to have the trustee proceed against the property or that he has refused to take steps to subject the property and administer the same as a part of the bankrupt’s estate.

“Applying this ruling to the facts of this case, it was error to refuse to dismiss the plaintiffs’ petition.”

This principle is generally accepted, as evidenced by the note in 11 *Ann. Cases* 932, which is as follows:

“In accord with the reported case it has been very generally held, both under the prior bankruptcy acts and under the Act of 1898, that after the appointment of an assignee or trustee in bankruptcy a creditor cannot maintain a suit to set aside a fraudulent transfer of property by the bankrupt, made prior to the adjudication, but that the right of action is in the assignee or trustee.

United States.—*Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301; • • •”

and numerous other authorities are also cited.

We quote from *American Jurisprudence*, Volume 6, page 657, Section 243, together with cases cited in note thereto:

"The trustee's right to maintain an action to set aside a fraudulent conveyance made by the bankrupt is exclusive; a creditor of the bankrupt cannot maintain such a suit, at least unless he makes the trustee a party thereto. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor to do so. Indeed, a creditor will acquire no right in that behalf, even if no trustee has been appointed. The trustee's representation of creditors in this respect is not confined to creditors who have liens on the property of the bankrupt, but applies equally to those by simple contract only, whose rights are not different except that until judgment and execution, they are not in a position to assert them.

"*Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929, 22 Am. Bankr. Rep. 643. Annotation: 11 Ann. Cas. 932.

"*Trimble v. Woodhead*, 102 U. S. 647, 26 L. ed 290."

To the same effect is the case of *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149.

Under the foregoing cases and the circumstances as outlined there can be no question that the levy in execution by the sheriff of Pawnee County, which was made within four months from the adjudication in bankruptcy, and under which the petitioner claims title by virtue of sale had after the adjudication, did not place the property involved in the possession of the sheriff. Neither did this levy give any cause of action to Sam Rainbolt, the judgment creditor, or those claiming under him, against the Pauline Oil & Gas Company to set aside the sale made to it by the assignee and

trustee for the benefit of creditors, the title to this cause of action being solely in the assignee and trustee in bankruptcy.

If a claimant in possession of property adverse to the trustee submits himself and property to the jurisdiction of the bankruptcy court in summary proceedings, where otherwise such court would not have jurisdiction, the adjudication in such summary proceedings is final and binding upon the trustee and such claimant.

In the case of *In Re Howard Laundry Co.*, 203 Fed. 445, the third syllabus by the court is as follows:

"Where an issue was raised between a landlord and her tenant's trustee in bankruptcy as to the ownership of certain machinery placed on the rented property by the bankrupt, the landlord was entitled to waive her right to have such issue determined in a plenary suit, and did so by appearing without objections and submitting her right to the master and the court, and was estopped thereafter to claim that the bankruptcy court had no jurisdiction thereof."

We quote from *American Jurisprudence*, Volume 6, page 729, Section 338, as follows:

"Jurisdiction may be conferred on the bankruptcy court by the defendant's consent in cases wherein otherwise it has no jurisdiction, and if adverse claimants in possession of the property, who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity, and priority of liens upon and interests in the property, may be tried out in the bankruptcy proceedings. * * *"

With citations referred to in the note thereto:

“Bankr. Act, Sec. 23b, 11 U. S. C. A., Sec. 46 (b).
See *supra*, Sec. 326.

“*Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed. 997, 29 S. Ct. 614, 22 Am. Bankr. Rep. 111; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 S. Ct. 557, 5 Am. Bankr. Rep. 623; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 S. Ct. 1000, 4 Am. Bankr. Rep. 163.”

CONCLUSION

Under the foregoing authorities, all rights of creditors to attack the validity of sale by the assignee for the benefit of creditors to the respondent, Pauline Oil & Gas Company, vested in the trustee in bankruptcy, and in him solely. The respondent, who was in actual physical possession of the property, submitted itself and this property to the jurisdiction of the referee in summary proceedings. In the hearing on this matter by the referee the issue as to the validity of the title of the respondent and the regularity of the sale had by the assignee and trustee for the benefit of creditors to it was definitely determined by the order of the referee, which was not appealed from by the trustee in bankruptcy, the judgment of the court being as follows (R. 16-17):

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Pauline Oil and Gas Company be and it is hereby decreed to be the owner of all oil and gas and the proceeds therefrom produced from said property either in the name of the Geraldine Oil Company, the Pauline Oil and Gas Company, or the Trustee in Bankruptcy, and said oil and gas and the proceeds therefrom which may be impounded or held by the pipeline

company receiving same, are hereby ordered released to the said Pauline Oil and Gas Company, a Corporation."

This judgment of the referee in summary proceedings was an adjudication of the validity of the respondent's title to the property involved herein. Both parties with title to any cause of action in relation thereto consented and submitted to the jurisdiction of summary proceedings, and are estopped from questioning same, even though in the absence of such consent the bankruptcy court would not have had jurisdiction to try such title.

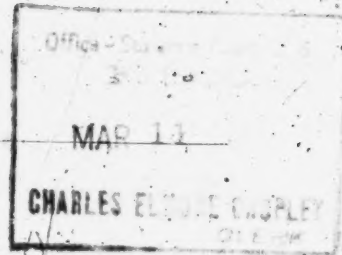
The petitioner has cited authorities to the effect that the nullity of the lien of execution declared by section 67f can only be raised by the trustee in bankruptcy or those claiming under him. We submit that under the foregoing circumstances and authorities the respondent, with a judgment of competent jurisdiction against the trustee in bankruptcy as to the validity of the title in this property and upon a submission of the \$2500 consideration therefor, is in the position of not only claiming under said trustee, but under a judgment as against said trustee and all parties represented by him.

Respectfully submitted,

CHARLES E. FRANCE,
Oklahoma City, Oklahoma,
Counsel for Respondent.

T. G. CHAMBERS,
JAMES R. EAGLETON,
Oklahoma City, Oklahoma,
Of Counsel.

FILE COPY



No. 239

In the Supreme Court of the United States

October Term, 1939

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REHEARING

CHARLES E. FRANCE,
Oklahoma City, Oklahoma,
Counsel for Respondent?

T. G. CHAMBERS,
JAMES R. EAGLETON,
Oklahoma City, Oklahoma,
Of Counsel.

SUBJECT INDEX

	PAGE
Petition for Rehearing	1
First Ground	1
Second Ground	2
Third Ground	2
Argument	4

Proposition:—The judgment confirming the sheriff's sale on execution and overruling the objections of the trustee in bankruptcy to confirmation, is not of such a nature as would bar the assertion of the respondent in this action that the property was not subject to seizure and sale

Proposition:—The decisions of the Supreme Court of Oklahoma in interpreting the statute providing for confirmation of sale are controlling. In the instant case, in which the petitioner, Abe Fischer, in his petition for rehearing to the Supreme Court of Oklahoma, specifically raised the issue of estoppel of the order of confirmation as against this respondent, Pauline Oil & Gas Company, in its contention that the property seized was not subject to sale, the denial of such petition was a controlling determination of that particular issue

Proposition:—It is determined by the opinion that the respondent, Pauline Oil & Gas Company, holds under the trustee in bankruptcy as his transferee, and the trustee's acquiescence in the confirmation of sale to the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title. It is also determined by the opinion and authorities cited that Section 67 (f) of the bankruptcy act may operate for the benefit of the trustee or one claiming under him as

SUBJECT INDEX (Continued)

	PAGE
against one claiming by virtue of the lien in a judicial proceeding wherein it is determined that at the date of the creation of the lien the bankrupt was insolvent, that the lien was acquired within four months of the filing of the petition in bankruptcy, and that the property affected was not sold to a bona fide purchaser. The instant case is such a judicial proceeding, and under the pleadings and evidence the bankrupt admittedly was insolvent at the date of the creation of the lien, the lien was acquired within four months of the filing of the petition in bankruptcy, and the property affected had been sold to Abe Fischer, who was not a bona fide purchaser. The opinion as written, therefore, with the exception as heretofore noted, should have affirmed title in the respondent, Pauline Oil & Gas Company, and approved the holding of the Supreme Court of Oklahoma -----	9

TABLE OF CASES

	PAGE
Brazell et al. v. Brockins et al., 95 Okl. 38, 217 P. 847 -----	5
Brewer et al. v. Warner, 105 Kan. 168, 182 P. 411 -----	6
Cherry et al. v. Godard et al., 179 Okl. 158, 64 P. (2d) 315 -----	4
Erie Railway Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 -----	7
Freeport Water Co. v. City of Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493 -----	8
Kline et al. v. Evans et al., 103 Okl. 44, 229 P. 427 -----	6

In the Supreme Court of the United States

October Term, 1939

No. 239

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY, *Respondent,*

PETITION FOR REHEARING

Comes now Pauline Oil & Gas Company, respondent, and prays the Court to grant a rehearing in the above cause and withdraw the opinion filed herein on the 26th day of February, 1940, written by Mr. Justice Roberts; and respondent further prays that the issuance of mandate herein be stayed pending the consideration of its petition.

The respondent, Pauline Oil & Gas Company, in support of its petition for rehearing, states the following reasons:

FIRST

The Supreme Court of Oklahoma, whose interpretation in such a matter is controlling, has held without exception that jurisdiction of the court on hearing to confirm sale of land made under general execution issued on judgment is confined to inquiry as to the regularity of proceedings on

sale, and order confirming sheriff's sale is not an adjudication that the land was lawfully subject to sale. Therefore, the opinion herein erroneously holds, on a matter not presented by the briefs herein, that the final and prior decision of the District Court of Pawnee County, made and entered on March 28, 1936, confirming the sheriff's sale under execution of the property involved to Abe Fischer, petitioner, and overruling the objections thereto of the trustee in bankruptcy, and granting to the trustee in bankruptcy an exception to its action, extended not only as an estoppel to the trustee, but to the respondent as his transferee, as to the contention that the property involved herein was not subject to levy and sale.

SECOND

The petitioner, Abe Fischer, in his petition for rehearing, presented to the Supreme Court of the State of Oklahoma the issue that the order confirming sale, unappealed from by the trustee in bankruptcy, was res adjudicata as to whether the property involved herein was subject to levy and sale. His petition was denied by the Supreme Court of Oklahoma. The opinion herein has therefore invaded the province of the State Supreme Court in its interpretation of its own local statute.

THIRD

The opinion herein is erroneous in not affirming the decision of the Supreme Court of Oklahoma in favor of this respondent. This is true for the following reasons:

The opinion held that the right of action, if any, to set aside an alleged fraudulent transfer and assignment for the

benefit of creditors, under which this respondent claims title, vested solely in the trustee in bankruptcy. The opinion held that "the trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title." The opinion held that the respondent, Pauline Oil & Gas Company, was the transferee of the trustee in bankruptcy. The opinion held that Section 67 (f) of the Bankruptcy Act avoids liens created within four months of bankruptcy as against the trustee and those claiming under him, but only in case the bankrupt was insolvent at the time and the lien claimant was not an innocent purchaser for value. In this connection the opinion states that in the trial of this cause as between the lien claimant, the petitioner, Abe Fischer, and this respondent, Pauline Oil & Gas Company, claiming under the trustee in bankruptcy, the facts disclose the insolvency of the bankrupt since October 11, 1934, when assignment of its property for the benefit of creditors was made and was not questioned, and that notice of the adjudication in bankruptcy was read at the sale on execution in the presence of Abe Fischer, petitioner and lien claimant.

Therefore, this respondent is brought squarely within the terms of Section 67 (f) as one holding under the trustee in bankruptcy. The bankrupt having been insolvent at the time of the creation of the lien, and the lien claimant, Abe Fischer, not being an innocent purchaser for value, and under the interpretation of the Supreme Court of Oklahoma the respondent not being estopped by order confirming sale in claiming that the property was not subject to sale, judgment should have been for the respondent.

ARGUMENT

PROPOSITION

The judgment confirming the sheriff's sale on execution and overruling the objections of the trustee in bankruptcy to confirmation, is not of such a nature as would bar the assertion of the respondent in this action that the property was not subject to seizure and sale.

In support of the foregoing, we quote from the body of the opinion in the case of *Cherry et al. v. Godard et al.*, 179 Okl. 158, 64 P. (2d) 315, as follows:

"In this state sales of land upon either general or special execution are required to be confirmed by the court. Section 456, O. S. 1931. Such confirmation is a judicial act and, as such, is entitled to and accorded some curative effect. See *Dixon v. Peacock et al.*, 43 Okl. 87, 141 P. 429; *Morgan v. Stevens et al.*, 101 Okl. 116, 223 P. 365. However, this judicial act of confirmation is not ordinarily given the same standing as is attributed to a decision upon carefully framed issues and pursuant to a formal notice. The reason for this limitation upon its standing in the field of judicial decisions is the limited scope of the inquiry and the recognized fact that such order of confirmation is frequently entered in an ex parte manner. As was said by the Kansas court in the case of *Brewer et al. v. Warner*, 105 Kan. 168, 182 P. 411, 413, 5 A. L. R. 385:

In the case of a sale under general execution the sheriff does not act as the agent of the court. The court has not specified the property or adjudicated the lien, and has not otherwise been concerned with the course which the sheriff shall pursue. In executing the process the sheriff has no guidance but the law, and takes his chance of

finding and levying on property which is not exempt.

'The purchaser at a sheriff's sale is not an innocent purchaser. He knows the limitations on the sheriff's power, and buys what the sheriff can sell, and no more. When the sheriff's return of sale comes before the court for confirmation, the proceeding may be, and commonly is, *ex parte*. Confirmation may take place on the motion of the sheriff, or of the purchaser, or on the court's own motion, and at any time without notice to anybody. Confirmation usually follows an inspection of the writ and the return, and, so far as the record discloses, confirmation in this case was typical. The order of confirmation is, indeed, an adjudication of all the facts involved in the inquiry (*Carter v. Hyatt*, 76 Kan. 304, 306, 91 P. 61); but how does the question of the exempt character of land seized and sold get into the case at that time?'

"Upon consideration of the nature of the proceedings upon which property is based, this court has held that the confirmation of an execution sale does not adjudicate the validity of the sale as against a subsequent claim of invalidity for want of appraisalment. See *Cuff v. Koslosky*, 165 Okl. 135, 25 P. (2d) 290. Upon similar consideration, it would seem that the confirmation of such a sale does not foreclose a subsequent assertion of the exempt character of the property in an appropriate action. The Kansas court so held under statutes similar to ours. *Brewer et al. v. Warner*, *supra*."

In the case of *Brazell et al. v. Brockins et al.*, 95 Okl. 38, 217 P. 847, the first paragraph of the Syllabus by the court is as follows:

"On a motion to confirm sale of real estate made under execution, the court should confine itself to the

regularity of the proceeding on the sale and is not required to go behind the execution and look into the regularity of the judgment."

To the same effect is the case of *Kline et al. v. Evans et al.*, 103 Okl. 44, 229 P. 427.

The Supreme Court of Kansas, from which state our code is taken, has interpreted this same statute providing for the confirmation of sale to the same effect as Oklahoma. This is evidenced by the case of *Brewer et al. v. Warner*, 105 Kan. 168, 182 P. 411, the first syllabus by the court being as follows:

"Confirmation of a sheriff's sale of land, made under a general execution issued on a judgment for debt, is not an adjudication that the land was lawfully subject to sale; and in an action by the debtor against the creditor for damages for deprivation of exempt property the debtor may show that the land was his government homestead, and that the debt was contracted before patent issued, notwithstanding confirmation of the sale."

In the opinion the court states:

"The decisions of this court are uniform and unanimous to the effect that confirmation of an execution sale does not adjudicate the fact that the land sold was lawfully subject to seizure and sale. The sheriff may sell land not subject to execution, because it belongs to a person other than the execution debtor. In that event confirmation adjudicates nothing against the owner. *Capital Bank v. Dunton*, 35 Kan. 577, 11 Pac. 369, syl. 1. *Indeed, the owner is not even concluded by denial of his motion to set aside the sale, interposed before confirmation. White-Crow v. White-Wing*, 3 Kan. 276; *Harrison & Willis v. Andrews*, 18 Kan. 535, syl. 3; *Mills v. Pettigrew*, 45 Kan. 573, 26 Pac. 33, syl. 2."

An examination of the order confirming sale, (Original record pages 257 to 259), discloses that the trial court in passing upon the motion to confirm sale and objections thereto made no special findings as to the objections made by the trustee in bankruptcy, but did make specific findings as to the regularity of the various steps in the procedure of sale. So, it may be assumed that the court in that instance was guided by the foregoing authorities, which limit its jurisdiction to an inquiry as to the regularity of the sale, and the trustee in not appealing from said order of confirmation must have accepted the law as interpreted by the court in failing to appeal, because there can be no question as to the intention of the trustee to reserve his right to protest to a sale wherein the proceeds were limited to \$750 as bid, and to accept and confirm the sale to this respondent, Pauline Oil & Gas Company for the sum of \$2500. With the jurisdiction of court limited, issues raised outside of such jurisdiction can be of no binding effect.

PROPOSITION

The decisions of the Supreme Court of Oklahoma in interpreting the statute providing for confirmation of sale are controlling. In the instant case, in which the petitioner, Abe Fischer, in his petition for rehearing to the Supreme Court of Oklahoma, specifically raised the issue of estoppel of the order of confirmation as against this respondent, Pauline Oil & Gas Company, in its contention that the property seized was not subject to sale, the denial of such petition was a controlling determination of that particular issue.

The case of *Erie Railway Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, held in its opinion, at page 78, U. S.:

“Except in matters governed by the Federal Constitution, or by the acts of Congress, the law to be ap-

plied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter for Federal concern. There is no Federal general common law."

In the case of *Freeport Water Co. v. City of Freeport*, 180 U. S. 587, 45 L.ed. 679, 21 Sup. Ct. 493, the Court in its opinion on page 497, Sup. Ct., makes the following holding:

"Acting on these principles, founded as they are on comity and good sense, the courts of the United States without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state court."

The petitioner, Abe Fischer, in his petition for rehearing before the Supreme Court of the State of Oklahoma, urged the following proposition, page 45, printed transcript:

"The opinion overlooks the final judgment of the District Court of Pawnee County, Oklahoma, which confirmed the sheriff's sale. The objections to the sheriff's sale presented by the trustee in bankruptcy to the District Court of Pawnee County, Oklahoma, adjudicated adversely the right of the trustee in bankruptcy to the property. This matter became *res adjudicata*, a fact entirely undisposed of and overlooked by the opinion."

And in support of said proposition cited *Staples v. Jenkins et al.*, 178 Okl. 186, 62 P. (2d) 504; also, 231 U. S. 692, 58 L. ed. 440, which citations do not go to the jurisdiction of the court on hearing of motion to confirm sale.

The petitioner, Abe Fischer, in his application to the Supreme Court of Oklahoma to file second petition for re-

hearing (printed transcript, pages 46 to 49), abandoned this proposition.

From the foregoing it would appear that this proposition has been passed upon by the Supreme Court of Oklahoma in this case, and its denial of said petition for rehearing is an adverse decision upon the merits of such contention and is controlling. Neither was this proposition presented or briefed in the present hearing.

PROPOSITION

It is determined by the opinion that the respondent, Pauline Oil & Gas Company, holds under the trustee in bankruptcy as his transferee, and the trustee's acquiescence in the confirmation of sale to the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title. It is also determined by the opinion and authorities cited that Section 67 (f) of the bankruptcy act may operate for the benefit of the trustee or one claiming under him as against one claiming by virtue of the lien in a judicial proceeding wherein it is determined that at the date of the creation of the lien the bankrupt was insolvent, that the lien was acquired within four months of the filing of the petition in bankruptcy, and that the property affected was not sold to a bona fide purchaser. The instant case is such a judicial proceeding, and under the pleadings and evidence the bankrupt admittedly was insolvent at the date of the creation of the lien, the lien was acquired within four months of the filing of the petition in bankruptcy, and the property affected had been sold to Abe Fischer, who was not a bona fide purchaser. The opinion as written, therefore, with the exception as heretofore noted, should have affirmed title in the respondent, Pauline Oil & Gas Company, and approved the holding of the Supreme Court of Oklahoma.

In support of the foregoing, we quote from the opinion wherein the respondent, Pauline Oil & Gas Company, is referred to as the transferee of the trustee in bankruptcy:

"The estoppel of the judgment of the state court extended not only to him (trustee in bankruptcy) but to the respondent as his *transferee*."

The opinion also had this to say with reference to the election of the trustee to avoid the levy on execution:

"The trustee's acquiescence in the confirmation of the sale of the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title."

As to the operation of Section 67 (f) for the benefit of the respondent, we quote from the opinion as follows:

"A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him. . . .

"Although Section 67 (f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially."

We quote from the opinion in its statement of facts as follows:

"October 11, 1934, Geraldine Oil Company, being insolvent, assigned the property in question to a trustee for the benefit of creditors. . . .

"November 12, 1935, the sheriff sold the property, pursuant to the execution, and the petitioner bought it. A notice of the adjudication in bankruptcy was read at the sale in the presence of the petitioner."

The opinion also states, which is an undisputed fact, that the Geraldine Oil Company was adjudged a bankrupt on October 24, 1935, and the sheriff levied on the property under his execution September 13, 1935, which, of course, is within the four months' period provided for in Section 67 (f).

As to the right of Abe Fischer, petitioner, to question the title of this respondent in the property, it is material to quote from the opinion's finding that the petitioner was never in possession of the property, and this is as follows:

"Both petition and answer allege that the respondent was in possession of the property at the time suit was brought, and we may assume that the petitioner never was in possession."

In this connection, the opinion failed to comment upon the cases submitted in respondent's brief in support of the following proposition:

"Upon adjudication of bankruptcy and the appointment of trustee and assignee for the bankrupt's estate, a right of action, if any, to set aside an alleged fraudulent transfer and assignment for the benefit of creditors vests solely in the trustee and assignee. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor, or those claiming under him, to do so."

This proposition is set forth and ~~pages cited~~ in support thereof on pages 5 to 8 of respondent's brief filed herein, and in the absence of any estoppel as against the respondent, Pauline Oil & Gas Company, we think should be decisive as against the petitioner's, Abe Fischer, right to attack this respondent's title, especially where petitioner has never had possession of the property. We respectfully urge the Court's examination and consideration of this on review.

We respectfully submit that the opinion should not stand; that it does not do justice to the cause; that it does not do substantial justice to the respondent; that it also would create a conflict in the law of this state as to the scope of order confirming sale on execution where none exists; and that the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

CHARLES E. FRANCE,

Oklahoma City, Oklahoma,
Counsel for Respondent.

T. G. CHAMBERS,

JAMES R. EAGLETON,

Oklahoma City, Oklahoma,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 239.—OCTOBER TERM, 1939.

Abe Fischer, Petitioner,
vs.
Pauline Oil & Gas Company.

On Writ of Certiorari to
the Supreme Court of
Oklahoma.

[February 26, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

An appeal taken in this case was dismissed for want of jurisdiction. Section 237(a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by Section 237(c), Judicial Code, as amended (43 Stat. 936, 938), we granted certiorari (308 U. S. —) because the judgment of the Supreme Court of Oklahoma¹ is based upon a construction of § 67(f) of the Bankruptcy Act of 1898,² which raises an important question concerning the operation of the section, not settled by decision of this court, on which state courts have reached conflicting conclusions.

The petitioner brought action to quiet his title to an oil and gas lease and to gain possession of the leased premises together with materials, machinery, tools, and appliances thereon, and for mesne profits, and damages. His claim was based on a sheriff's deed consummating an execution sale under a judgment entered upon an award of the State Industrial Commission against Geraldine Oil Company. The respondent's title was derived through a conveyance by an assignee for the benefit of creditors of the same company, confirmed by a bankruptcy court. The respondent cross-petitioned for a judgment declaring the sheriff's sale to petitioner void and quieting respondent's title. The trial court directed a verdict for

¹ Pauline Oil & Gas Co. v. Fischer, 185 Okla. 108; 90 Pac. (2d) 411.

² 11 U. S. C. § 107(f). The provisions of § 67(f) of the Bankruptcy Act of 1898 are now carried over into, modified and clarified by chapter VII, § 67a, (1), (2), (3) and (4) of the Chandler Act of June 22, 1938, 52 Stat. 840, 875. The question here presented, however, may arise under the later act.

petitioner and entered judgment thereon, which the Supreme Court reversed.

August 30, 1934, the Commission made an award to one Rainbolt against Snyder, as employer, and Geraldine Oil Company, as owner of the property. For payment of the award Geraldine Oil Company was secondarily liable.

October 11, 1934, Geraldine Oil Company, being insolvent, assigned the property in question to a trustee for the benefit of creditors.

December 8, 1934, the award in favor of Rainbolt was filed of record in a State District Court and became a judgment of that court.

January 21, 1935, the assignee for the benefit of creditors sold the property to the respondent.

September 13, 1935, execution issued on the Rainbolt judgment, and, September 17th, the sheriff levied on the property as property of the Geraldine Oil Co. The execution was issued on the theory that the assignment for the benefit of creditors was invalid, and the property, therefore, remained that of the assignor.³

October 24, 1935, Geraldine Oil Company was adjudged a voluntary bankrupt in the District Court of the United States for Western Oklahoma.

November 12, 1935, the sheriff sold the property, pursuant to the execution, and the petitioner bought it. A notice of the adjudication in bankruptcy was read at the sale in the presence of the petitioner. On the same day the sheriff made return of the sale to the court out of which the execution issued.

November 21, 1935, the trustee in bankruptcy filed in that court his objections to the confirmation of the sheriff's sale, alleging, *inter alia*, that Geraldine Oil Company was insolvent when Rainbolt obtained judgment and had been so ever since; that the company had been adjudicated a bankrupt within four months of the securing of the lien under the execution, and that, by virtue of § 67 (f) of the Bankruptcy Act, the lien was absolutely void.

March 28, 1936, the court ordered that the sale be confirmed and granted the trustee in bankruptcy an exception to its action. The latter gave notice of appeal to the Supreme Court of Oklahoma, but it does not appear that he perfected an appeal. The order of confirmation was entered of record April 22, 1936.

³ See *Wells v. Guaranty State Bank*, 56 Okla. 558, 156 Pac. 896; *First State Bank v. Bradshaw*, 174 Okla. 268, 51 P. (2d) 514.

June 4, 1936, the respondent petitioned the United States District Court for confirmation of the sale of the property made to the respondent by the assignee for the benefit of creditors on January 21, 1935. The trustee in bankruptcy objected, but subsequently withdrew his objections and the referee made an order confirming the sale. The assignee then paid to the trustee the consideration received by him from the respondent as purchaser at the assignee's sale. It does not appear that the petitioner had notice of the application or was present at the hearing.

June 10, 1936, the sheriff delivered a deed to the petitioner as purchaser at the execution sale.

Both petition and answer allege that the respondent was in possession of the property at the time suit was brought, and we may assume that the petitioner never was in possession.

The Supreme Court held that entry of the Commission's award in the State Court made it a judgment of that court; that such judgment did not constitute a lien on the property of Geraldine Oil Company in question; and that no lien was acquired until the levy of execution on September 17, 1935, about a month prior to the adjudication of the company as a bankrupt.

The respondent asserted that, as the judgment in favor of Rainbolt was not a lien when Geraldine Oil Company assigned for the benefit of creditors, or when the assignee sold the property to the respondent, its title must prevail; and, in the alternative, that the same result must follow from the fact that since the lien of the levy was obtained less than four months prior to the filing of the petition in bankruptcy, it was voided by § 67(f).

The Supreme Court stated that, if either of these contentions were sound, the petitioner could not prevail. It expressly declined to consider the efficacy of the sale by the assignee for the benefit of creditors to pass title to the respondent clear of the lien of the subsequent levy, and rested its decision upon its view of the effect of § 67(f). Since the judgment is based exclusively upon a federal ground, we have jurisdiction.

§ 67(f) provides:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy,

judgment, attachment, or other lien, . . . shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The court held that the section, *proprio vigore*, nullified the lien of the levy so that the property passed to the trustee discharged thereof, and concluded that, since, at the time of the sheriff's sale, the property was discharged of the lien, the sale, and the deed delivered pursuant to it, were void; and, as a trustee's sale would pass title clear of the lien, the same result would follow from the bankruptcy court's validation, with the trustee's consent, of the assignee's sale previously made.

The question is whether the state court was right in holding that, by force of §67(f), the adjudication in bankruptcy automatically discharged the lien of the levy, irrespective of any action on the part of the trustee. Expressions supporting this view may be found in cases decided by federal courts,⁴ and statements squinting in the same direction have been made by this court.⁵ In none of these instances, however, was the litigation between third parties, or between the lienor or one claiming title under an execution sale, and an opponent deriving title from the trustee in bankruptcy. In all of them a bankruptcy receiver or trustee instituted action in the bankruptcy court or some other court, or became a party to the proceeding in which the lien was acquired, to avoid the lien, or the bankrupt brought suit to avoid the lien as to property set apart to him as exempt in the bankruptcy case.

Some state courts have definitely held that the adjudication operates automatically to nullify the lien which must be treated as void whenever and wherever drawn into question, either in a direct

⁴ *In re Tuna*, 115 Fed. 906; *In re Beals*, 116 Fed. 530; *In re Federal Biscuit Co.*, 214 Fed. 221, 224.

⁵ *Clarke v. Larremore*, 188 U. S. 486, 488; *Chicago, B. & Q. R. Co. v. Hall*, 229 U. S. 511, 514; *Lehman Stern & Co. v. S. Gumble & Co.*, 236 U. S. 448, 454.

or a collateral proceeding, and whether the trustee in bankruptcy has taken the property into his possession or abandoned it.⁶

On the other hand, it was said in *Taubel-Scott-Kitzmiller Co. v. Fox, et al.*, 264 U. S. 426, 429: "For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy." The court there pointed out that a number of issues of fact must be resolved before it can be determined that the lien is void. And, in *Pigg & Son v. United States*, 81 F. (2d) 334, 337, it was held that liens obtained in judicial proceedings within four months of the filing of the petition are not void, but voidable in a proper suit, and that the property affected by the lien does not automatically pass to the trustee, discharged of the lien.

In *Connell v. Walker*, 291 U. S. 1, 3, this court indicated that the operation of § 67(f) is not automatic, since the trustee in bankruptcy has an election either to avoid the lien, or to be subrogated to it for the benefit of the bankrupt estate.

A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him.⁷ It is settled, however, that not only may the trustee avoid the lien (*Taubel-Scott-Kitzmiller Co. v. Fox, et al.*, *supra*; *Connell v. Walker*, *supra*), but that the bankrupt may assert its invalidity as respects property set apart to him as exempt in the bankruptcy proceeding. *Chicago, B. & Q. R. Co. v. Hall*, 229 U. S. 511. But the lien is not avoided for the benefit of the bankrupt save as to his exempt property or nullified as respects other lienors or third parties.⁸

⁶ *Mohr v. Mattox*, 126 Ga. 962; *Hobbs v. Thompson*, 160 Ala. 360; *Finney v. Knapp Co.*, 145 Ga. 400; *Greenberger v. Schwartz*, 261 Pa. 265; *Archenhold Co. v. Schaefer*, 205 S. W. 139 (Tex. Civ. App.); *Morris Fertilizer Co. v. Jackson*, 27 Ga. App. 567; *Mack v. Reliance Ins. Co.*, 52 R. I. 402; *Whittaker v. Bacon*, 17 Tenn. App. 97; *Bank of Garrison v. Malley*, 103 Tex. 562. Compare, *Kellogg-Mackay-Cameron Co. v. Schmidt Baking Co.*, 101 Ill. App. 209; *Keystone Brewing Co. v. Schermer*, 241 Pa. 361; *Lamb v. Kelley*, 97 W. Va. 409.

⁷ *Frasce v. Nelson*, 179 Mass. 456; *Swaney v. Hasara*, 164 Minn. 416; *Hutchins v. Cantu*, 66 S. W. 138 (Tex. Civ. App.); *Equitable Credit Co. v. Miller*, 164 Ga. 49; *Neugent Garment Co. v. U. S. F. & G. Co.*, 202 Wisc. 93.

⁸ See the cases in Note 7, *supra*, and *McCarty v. Light*, 155 App. Div. (N. Y.) 36; *Travis v. Bixler Co.*, 66 P. (2d) 1263 (Cal. App.); *Danby Millinery Co. v. Dogan*, 47 Tex. Civ. App. 323; *Smith v. First National Bank*, 76 Colo. 34; *Taylor v. Buser*, 167 N. Y. Supp. 887.

Although § 67(f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially. The courses open to the trustee under the Bankruptcy Act of 1898 were to proceed to have the lien declared void, by plenary suit,⁹ or by intervention in the court where it was obtained,¹⁰ or by applying, in the bankruptcy cause, to restrain enforcement,¹¹ as might be appropriate in the circumstances.

In the instant case the trustee intervened in the state court and opposed the confirmation of the execution sale on the ground that § 67(f) had avoided and discharged the lien of the levy. The issue was decided against him and he did not appeal. Later, when the respondent, who had purchased at the assignee's sale, asked the bankruptcy court to confirm that sale, the trustee withdrew his objections to confirmation and accepted from the assignee the consideration received from the respondent as purchaser at the latter's sale. The trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of the execution did not constitute an encumbrance upon respondent's title. But we think, if in other circumstances the trustee's conduct could amount to an election to avoid the lien, it can have no such effect here, in view of the prior decision against him on that issue in the state court.

We are of opinion that the trustee, having raised the issue in the state court, was bound by the final decision of that tribunal. The

⁹ See *Taubel-Scott-Kittmiller Co. v. Fox*, *supra*.

¹⁰ 11 U. S. C. § 29(b). See *Lehman Stern & Co. v. S. Gumbel & Co.*, 236 U. S. 448; *Isaac v. Hobbs Tie & Timber Co.*, 282 U. S. 734.

¹¹ *Clarke v. Lawrence*, 189 U. S. 484. The Chandler Act, § 67a(4), 52 Stat. 876, vests summary jurisdiction in the bankruptcy court to hear and determine, after notice to the parties in interest, all questions affecting the validity of the lien.

estoppel of the judgment of the state court extended not only to him but to the respondent as his transferee. This conclusion requires reversal of the judgment.

We do not pass upon the question whether the title of the respondent, derived from the sale of the property to it by the assignee for the benefit of creditors, is, by virtue of that sale, superior to the title of the petitioner. This is a question of state law which the court below remains free to decide.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.